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JURISDICTION OVER FOREIGN CORPORATIONS.

THE theories of the courts with regard to jurisdiction over foreign corporations have been modified by changes in the conditions to which they have been applied. The principle that a corporation cannot migrate, but must dwell in the place of its creation, was confronted by the fact that corporations did send their agents into other States and make contracts there, and it became necessary to decide whether such contracts were not void for want of power to make them, and also whether the foreign corporations could be sued upon such contracts in the courts of the State where they were made.

With respect to the former question the courts declared that although a corporation could have no legal existence out of the sovereignty by which it was created, and must be regarded as a person living there and there only, yet if it sent its agents into another State and made contracts there, its existence might be recognized by that State, and the contract, if not contrary to the laws of that State, would be a valid contract, and the corporation might bring a suit upon it there. Such was the decision of the Supreme Court of the United States in *Bank of Augusta v. Earle*,¹ in which the principle was maintained by Daniel Webster, in an elaborate argument, and affirmed in the opinion of Chief Justice Taney. The question was not whether the court of the

¹ 13 Peters, 519.

foreign State had jurisdiction, but whether the corporation had capacity to sue, and whether the contract had any validity. The decision was, that for the purposes of making contracts beyond the State of its creation, a corporation might be recognized by the comity of other States, and that if so recognized, it had power through its agents to make contracts in those States not contrary to their laws, and could bring an action on these contracts in such States.

The question whether a corporation may be sued outside of the State of its creation depends on different considerations. In order that a suit may be brought against it, it is necessary not only that its power to act through agents outside of the State of its creation should be recognized, but also that it should be found for the purpose of serving process within the State in which the action was brought. It is a principle of natural justice that a judgment cannot be rendered without giving an opportunity for defence, and that service of process within the State is necessary to give jurisdiction in an action *in personam*.¹

At common law, service of process upon a corporation could be made only upon the head or principal officer of the corporation, and within the jurisdiction of the sovereignty which created it; and from this rule it followed of necessity that a valid judgment against it *in personam* could not be obtained in the courts of another jurisdiction. Even though a corporation might be recognized by the laws of other States, and might act there by agents and make contracts, and even bring suits there, yet it could not be found there for the purpose of being served with process, and the courts had not jurisdiction to entertain suits against it. Accordingly, we find the Supreme Court of New York in 1819 expressing the opinion that a foreign corporation cannot be sued in that State, for the reason that process must be served upon the head or principal officer of the corporation within the jurisdiction of the sovereignty where it was created. This opinion was cited with approval by the Supreme Court of Massachusetts in 1834,² and the Court said that all foreign corporations were without the jurisdiction of the Courts of that commonwealth. A similar opinion was expressed in New Hampshire in 1838,³ and in Connecticut in 1841;⁴ and

¹ Fisher v. Lane, 3 Wils. 297; Pennoyer v. Neff, 95 U. S. 734.

² Peckham v. North Parish in Haverhill, 16 Pick. 274.

³ Libby v. Hodgeton, 9 N. H. 394.

⁴ Middlebrook v. Springfield Fire Ins. Co., 14 Conn. 301.

in England Lord Blackburn said in 1872 that he was not aware of any reported case in which a foreign corporation had been sued in a court of law, and while he refused to set aside the service of a summons, he said the defendant might raise the question after appearing on the record.¹

The idea that corporations cannot migrate had its origin in cases relating to municipal and ecclesiastical corporations in England, which were local in their character; and when the law of corporations was applied in this country to associations for the purposes of business, it was soon found that although in legal contemplation they dwelt in the place of their creation, they did in fact transact business in all parts of the country, and as more and more of the business of the country came to be transacted by corporations, it became evident that it was necessary that some theory should be devised by which they should be amenable to actions in the States in which their business was transacted. It was suggested, therefore, that they could not transact business there at all without the assent, express or implied, of the State to which they came; that being mere creatures of the law of another State, their existence need not be recognized at all, except under conditions; and it was competent for the legislature to declare that, if they came and transacted business, they should be considered as found there for the purpose of service of process in litigation arising out of business in which the company was so engaged.

The principle that, in order to jurisdiction in a suit *in personam*, the corporation must be found within the territory of the court in which the suit is brought is fundamental; but the rule that the process must be served upon the principal officer was a rule of practice founded only on the necessity of giving notice to a person who really represents the company, with respect to the subject-matter of the suit. When, therefore, companies sent their agents into foreign jurisdictions and transacted business there, it was competent for the government of those States or countries to declare that the agents sent for the purpose of transacting business did in fact represent the companies with respect to that business, and that the companies were in fact found there for the purposes of litigation arising out of that business. Such was the decision of the Supreme Court of the United States in 1855, in *La Fayette Insurance Co. v. French*;² and in 1882 the same court, in a later

¹ *Newby v. Van Oppen*, L. R. 7 Q. B. 293.

² 18 How. 404.

case,¹ declared that the principle of this decision applied to a case in which the condition was not express, but was merely implied by the fact that the State permitted foreign corporations to transact business within its borders, and at the same time provided that process in an action against such a corporation might be served on certain officers or agents found within its borders. The court said that since the corporation of one State sent agents into another, and opened offices and transacted business there, and was protected by its laws, it seemed right that it should be held responsible for obligations and liabilities there incurred. The officers and agents of a corporation, said Mr. Justice Field, "constitute all that is visible of its existence, and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the State for which they are respectively appointed when it is called to legal responsibility for their transactions."

In the case of La Fayette Insurance Company the action was brought upon a contract made within the State, and the service was made upon an agent appointed under the statute of Ohio, for the purpose of receiving service of process in an action on such a contract, and it was held that the court had jurisdiction. In the other case it did not appear that the corporation, which was organized in Illinois, had transacted any business in the State of Michigan, nor that the agent served with process was charged with any business of the company in that State, and the Supreme Court decided that the State court had no jurisdiction over the corporation, and that a judgment entered against it was invalid.

The result of these and other decisions on this subject is clearly stated by Mr. Justice Jackson (then Circuit Court Judge), in *United States v. Bell Telephone Co.*² He says: "We think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur and coexist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held. (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by

¹ *St. Clair v. Cox*, 106 U. S. 350.

² 29 Fed. Rep. 17.

and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the State."

Such are the conditions under which alone, in the opinion of the Supreme Court, jurisdiction may be obtained by the courts of one State over the corporations of another. There are some courts that assume jurisdiction in cases in which all these conditions are not fulfilled; but the doctrine of the Supreme Court is based upon sound legal principles and the considerations of justice, and is concurred in for the most part by the courts of the several States.

The question I wish to suggest is whether still another condition must not coexist with these three in certain cases in order that jurisdiction may be had over a foreign corporation. Must not the cause of action have some relation to the business which the corporation is transacting in the State, or to the scope of the agency of the persons by whom it is represented? Does the fact that a corporation transacts some business within the State make it subject to an action over a matter having no relation to that business? Or, does the fact that a corporation, being required by statute to do so as a condition of doing business, has appointed an agent to receive service of process in a certain State, make it amenable there to an action for a tort committed elsewhere? Does a corporation of one State or country, which, for the purpose of doing some little business in another jurisdiction, appoints an agent to receive service of process, make itself liable to an action there by anybody, or for any cause? Or, is the effect of appointing such agent only to make the corporation liable to be sued by citizens of the State on causes of action arising within the State, and out of the business done within the State? The question is obviously an important one, and is one which counsel are called upon to answer in advising corporations as to the effect of designating an agent to receive service of process, which is now required in so many States as a condition of doing business there. The subject has been discussed in recent cases, but there is a difference of opinion among the courts, and the question is not yet fully settled by judicial decision. In some States, and in one at least of the United States Circuit Courts of Appeals,¹ it has been held that by service of process upon an agent designated under the statute for that purpose,

¹ *Johnston v. Insurance Co.*, 132 Mass. 422 (1882); *Mooney v. Buford and George Mfg. Co.*, 34 U. S. App. 581; 72 Fed. Rep. 32 (1896).

jurisdiction is acquired over a foreign corporation even in suits by non-residents, and upon contracts made and to be performed outside of the State; and in other States it has been declared that, in the absence, at least, of express language to that effect, such statutes cannot be construed as requiring foreign corporations to submit to jurisdiction over causes of action arising outside of the State, and having no relation to any business transacted within the State;¹ and in one of these cases the court said: "To hold otherwise would be to allow foreign corporations which transact business in Alabama to be drawn into our courts for the adjudication of every contract and every tort and wrong they may be charged with committing, even in the State which gave them their being."

There are two classes of statutes relating to the service of process on foreign corporations. In one class it is merely provided that service of process on such corporations may be made on certain officers or agents within the State; in the other, it is declared, as a condition on which they are allowed to transact business within the State, that they shall designate a person on whom process may be served with like effect as if service of process had been made on the corporation within the State, or even with like effect as if made on a domestic corporation. In either class of cases there is no question but that if the corporation transacts business in the State, and an action arise out of this business, jurisdiction *in personam* may be acquired by service of process on such agent. It is equally well settled that under the statute of the former class, if the corporation transact no business in the State, jurisdiction cannot be acquired by serving process on an officer or agent casually within the State,² even though the local statute provide that process against a foreign corporation may be served on any officer or agent of the company within the State.³ Such a statute, said Chief Justice Beasley, in the case just cited, does not give any new right of suit, nor does it purport to take away any of the privileges of foreign corporations. It simply appoints a method of bringing corporations invested with a foreign character into the courts of this State when such courts have jurisdiction over them. In such cases it is only when the agents represent the

¹ *Sawyer v. North Am. Life Ins. Co.*, 46 Vt. 697; *Bawknight v. London L. & G. Ins. Co.*, 55 Ga. 194; *Central R. R. Banking Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339.

² *Moulin v. Trenton Insurance Co.*, 4 Zab. (N. J.) 222.

³ *Camden Rolling Mill Co. v. Swede Iron Co.*, 3 Vr. (N. J.) 15; *St. Clair v. Cox*, 106 U. S. 350; *Goldey v. Morning News Co.*, 156 U. S. 518.

company in the transaction of business within the State that the company is considered as being found there for the purpose of receiving service of process.¹ The questions remaining unsettled are whether, if, under the former class of statutes, the company transact business within the State, and send agents there for that purpose, it can be sued there with respect to matters having no relation to that business; and whether, under the latter class of statutes, if a company designate a person to receive service of process, it can be sued whether it actually transact business in the State or not, or with respect to matters having no relation to the business it does transact there.

The fact that the cause of action arose outside of the territory does not of itself defeat the jurisdiction of the court. If the defendant be found within the reach of process, and the action be what is called transitory, the action may be maintained, and the judgment is good. It was only by a fiction that this result was obtained in the English law; but this was because of a rule of practice which required that the trial should be had before a jury of the neighborhood, and not because of an inherent lack of jurisdiction.² There are cases, however, in which the English courts and ours (and they are more liberal in this respect than those of the continent of Europe) will refuse to entertain actions against foreigners for causes arising abroad; and they will not enforce contracts illegal where they are made, nor treat as torts acts that are legal where committed.³ The general rule, however, is that "where the action is *in personam*, whether in respect of a contract or of a tort, our courts will entertain it, though it may have arisen abroad, and though the parties to it may be aliens, provided that service of process be made according to their rules;"⁴ and although the jurisdiction exists, it will not always be exercised, unless the circumstances are such that a refusal to entertain the action would be a denial of all remedy.⁵

¹ Camden Rolling Mill Co. v. Swede Iron Co., 3 Vr. (N. J.) 15; St. Clair v. Cox, 106 U. S. 350; Goldey v. Morning News Co., 156 U. S. 518.

² Mostyn v. Fabrigas, Cowp. 161.

³ Phillips v. Eyre, L. R. 1 Q. B. 1, 28; Doulson v. Matthews, 4 Term R. 503; Santos v. Illidge, 6 C. B. N. s. 841.

⁴ 1 Smith's Ldg. Cas., 8th Am. ed., 1051-1068; Story, Conft. Laws, 542, 543; Whar ton's Conft. Laws, 744; Phill. Priv. Int. Law, 701; Buenos Ayres Ry. Co. v. Northern Ry. Co., 2 Q. B. D. 210; Scott v. Lord Seymour, 1 H. & C. 219; LeForest v. Tolman, 117 Mass. 109.

⁵ DeWitt v. Buchanan, 54 Barb. 31. In the case of The Belgenland, 114 U. S. 355, Mr. Justice Bradley refers to the elaborate arguments of counsel in the case of the

The objection, then, to entertaining jurisdiction over a foreign corporation for a cause of action arising abroad does not consist in the fact that there is no jurisdiction to determine the cause of action. The difficulty lies rather in the question whether the corporation is found within the territory for the purpose of answering to any such action. It has been held that, with respect to business done within the State or country, it is represented by the agents who transact the business, or agents especially appointed to receive service of process; but it does not follow that by this means it has brought itself within the jurisdiction of the courts with respect to all its transactions in the country of its creation, or in all parts of the world.

Judge Jackson, in the telephone case above referred to,¹ says that, where these conditions exist, and there is a local law authorizing the service of process on agents within the State, a foreign corporation is *found* within the State, and is liable to suit there in the State or Federal courts by service of process on the resident agent, and that the underlying principle of the decisions that he refers to is that the State may impose conditions on the transaction of business within the State by corporations chartered elsewhere. The decisions that he referred to were all rendered in cases in which the action had reference to the subject-matter of the agency or business within the State. It had been held that when a corporation sent agents into a State for the purposes of its business, there was no reason why, to the extent of their agency, they should not be deemed to represent it when called to a legal responsibility for their action.²

It was because the corporation had come into the State by its agents for the transaction of its business that it was held to be found there in the same agents for the purpose of being sued there with respect to that business; and the case in Ohio,³ where an agent had been appointed under the statute, was a case in which the action was brought upon a contract made in Ohio, and

San Francisco Vigilance Committee, *Maloney v. Dows*, 8 Abbott, Pr. 316, which he says contain an instructive analysis of the law upon the question whether and in what cases the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. His own opinion in the case of *The Belgenland* is confined to an inquiry into the rule followed by the Courts of Admiralty.

¹ *United States v. Bell Telephone Co.*, 29 Fed. Rep. 17

² *St. Clair v. Cox*, 106 U. S. 330, 355.

³ *La Fayette Ins. Co. v. French*, 18 How. 404.

the condition under which the contract was made was that an agent should be appointed to accept service of process in a suit on such contract. And in this case Mr. Justice Curtis, while asserting the principle that the States might impose conditions upon the transaction of business by foreign corporations, said: "These conditions must not be inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity of defence." These cases, therefore, leave the question open whether a foreign corporation sending its representatives into a State for one purpose is found there in the person of these representatives for the purpose of being called to account in all causes of action; and also whether a corporation which, as a condition of doing business in a State, appoints an agent to receive a service of process there, can be said to be found there for the purpose of being sued for causes of action having no relation to the business done within the State.

It must be remembered that a foreign corporation exists by virtue of the laws of another sovereignty, and has no existence outside of the territory where it was created, except so far as its existence is recognized by the laws of other countries; and even though its existence be recognized there, it cannot exist there except so far as it acts there by its agents. It may by the leave, express or implied, of the other sovereignty establish a place of business there, and if it is recognized there, it is then found there for the purpose of its business, and may be regarded as found there for the purpose of being sued; but this is only because, by having sent its agents there subject to the conditions imposed by the local law, it has consented to be found there for the purpose of being sued.

Although it is well settled that a corporation, by establishing a place of business in another State, may be found there in the persons of its agents for the purpose of being sued with reference to that business, yet it has been repeatedly decided by the Supreme Court of the United States that even in such a case the residence of such a corporation is exclusively in the State of its creation, and it must be regarded as a citizen of that State alone;¹ and even though it be said that a corporation acquires a domicile where it

¹ *Bank of Augusta v. Earle*, 13 Pet. 519; *La Fayette Ins. Co. v. French*, 18 How. 404; *Shaw v. Milling Co.*, 145 U. S. 444; *Remers, v. Seatco Mfg. Co.*, 70 Fed. Rep. 573-577.

establishes a business,¹ yet it is only by reason of its own act in establishing the business and by virtue of the local law which recognizes its existence there. The corporation remains a foreign corporation, and is subject to the laws of another sovereignty only so far as it has subjected itself to the laws of that country; and the inquiry must always be whether it has in fact subjected itself to those laws to such an extent as to be subject to the jurisdiction of its courts in the action which is brought against it.

"It is an elementary principle of jurisprudence," says Mr. Justice Gray, in a recent case in the Supreme Court of the United States,² "that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service within the jurisdiction of notice upon him, or upon some one authorized to accept service in his behalf, or by his waiver by general appearance, or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."³

A foreign corporation, therefore, is not subject to the jurisdiction of the courts, except so far as by its acts within the State, or by its consent, or by its acceptance of conditions imposed, it has subjected itself to their jurisdiction. It must appear that it has come within the territory, and that its existence is recognized there, or it cannot be sued at all. If it has come for the transaction of certain business, then the agents which represent it in that business may be regarded as representing it for the purpose of being sued with reference to the business so intrusted to them; but it does not follow that they represent it for all purposes, or that the corporation may be regarded as found there for the purpose of being sued with reference to matters appertaining wholly to business transacted elsewhere. So also if a State require as a condition of a foreign corporation doing business within its borders that it appoint agents to accept service of process, the presumption is that only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission. Such a condition has relation to the permission given, and would be uni-

¹ 6 *Thomp., Corp.*, § 7998.

² *Goldey v. Morning News*, 156 U. S. 518.

³ *D'Avery v. Ketcham*, 11 How. 165; *Knowles v. Gas Light Co.*, 19 Wall. 58; *Hall v. Lanning*, 91 U. S. 160; *Pennoyer v. Neff*, 95 U. S. 714; *York v. Texas*, 137 U. S. 15; *Wilson v. Seligman*, 144 U. S. 41.

versally recognized as reasonable, and jurisdiction assumed by this means and for this purpose would not be regarded as a usurpation of power; but if a State should declare that no foreign corporation should send an agent for any purpose within its borders unless it should submit to jurisdiction over all suits against it arising out of its business in the country where it was organized, this might well be regarded as an unwarranted assumption of power which should not be recognized in the courts of other countries.

Whether this be so or not, it may be confidently asserted that the statutes by which the jurisdiction is assumed should be construed strictly, and should not, unless their language is explicit, be held to confer jurisdiction beyond that which is required to enable the courts to take cognizance of matters arising out of the business done within the State, or else to protect and enforce the rights of the residents of their own State against foreign corporations.

Applying this principle to those statutes which merely declare that process against a foreign corporation may be served on any officer, director, or other specified agent within the State, there would seem to be no doubt that they are not of themselves sufficient to confer jurisdiction over any causes of action having no relation to the business transacted within the State. It is well settled, as we have seen, that they confer no jurisdiction at all when the corporation does not come within the State for the transaction of any business.¹ Speaking of such a case Chief Justice Beasley said: "It would be difficult to believe that it was the design to place within the jurisdiction of our courts all the corporations of the world, merely from the fact that a director, clerk, or other subordinate officer happened to come within the territory."² Such a statute, he said, did not indicate an intent to amplify the jurisdiction of the courts over foreign corporations, but only to provide a mode of service in cases in which, under the principles of law, such jurisdiction existed. The principle is that if the agent comes within the State empowered to make or take contracts, the corporation may be regarded as representing it for the purpose of receiving process in actions arising out of those contracts, or out of the business done

¹ *Moulin v. Trenton Ins. Co.*, 4 Zab. 222; *Camden Rolling Mill Co. v. Swede Iron Co.*, 3 Vroom (N. J.), 15; *St. Clair v. Cox*, 106 U. S. 350; *Phillips v. Library Co.*, 141 Pa. St. 462; *Newell v. Gt. Western Ry. Co.*, 19 Mich. 336; *Goldey v. Morning News Co.*, 156 U. S. 518.

² *Camden Rolling Mill Co. v. Swede Iron Co.*, 3 Vroom, 15.

there.¹ It is not enough that officers or agents of the corporation are found and served with process within the State. They must be there in their capacity of representatives of the corporation in order that service upon them may be good service upon the corporation. It is only because the agents represent it within the State, and to the extent to which they do represent it, that the corporation is found there for the purpose of being served with process.²

The mere fact, therefore, that a corporation does some business in a State, and that the law makes provision for the service of process on the agents of a foreign corporation, will not make the corporation subject to be sued there upon causes of action having no relation to the business done within the State.

Such was the opinion of the Supreme Court of Georgia, the Supreme Court of Vermont, and the Supreme Court of Alabama in cases in which the question was fairly presented for decision. In *Bawknight v. Liverpool & London & Globe Insurance Co.*,³ the court said: "We are not aware of any case which has decided that a foreign corporation may be sued *in personam* here on a foreign judgment, or on a contract or debt of any sort with which the Georgia agency has no connection, and it was held that an action could not be maintained in Georgia against an English corporation on a contract made outside of the State, and having no relation to the business done in Georgia, although the summons was served under the statute on an agent there." . . . "It would be strange if such were the law. A debt created in England by this English corporation could then be sued here; a debt made in China might be sued on *in personam* here when the corporation is allowed to live only for certain purposes, instead of being sued at home where it lives for all purposes."

In *Sawyer v. North American Life Ins. Co.*,⁴ the Supreme Court of Vermont held that it had no jurisdiction over a suit by a non-resident against a foreign corporation on a contract made abroad, although process was served on an agent under a statute providing for such service.

In *Central Railroad and Banking Co. v. Carr*,⁵ suit was brought in Alabama against a railroad company incorporated only in

¹ 6 *Thomp., Corp.*, §§ 7997, 8029; *La Fayette Ins. Co. v. French*, 18 *How.* 404; *Smith v. Mut. Life Ins. Co.*, 14 *Allen*, 336; *Nichols v. Green*, 72 *Iowa*, 239.

² *Mulhearn v. Press Publishing Co.*, 53 *N. J. L.* 150; 57 *N. J. L.* 388.

³ 55 *Ga.* 194.

⁴ 46 *Vt.* 697.

⁵ 76 *Ala.* 388; 52 *Am. Rep.* 339.

Georgia, but doing business also in Alabama, having its line in both States. The plaintiff sued for personal injuries received while travelling in Georgia, and the summons was served on "a white person in the employ of the company," as authorized by statute. It was held by the Supreme Court of Alabama that the action could not be maintained. The court said that the service on such an agent would give jurisdiction of a cause of action which originated in one State, but that it is well settled that no action *in personam* can be maintained against a foreign corporation unless the contract sued on was made, or the injury complained of was suffered, in the State in which the action is brought.¹ The court said: "We cannot think that it was the intention of the legislature in any of the statutes we have been considering to allow foreign corporations to be sued in the State, except on causes of action originating in this State, or on contracts entered into with reference to a subject-matter within this State. To hold otherwise would be to allow foreign corporations which transact business in Alabama to be drawn into our courts for the adjudication of every contract and every tort and wrong they may be charged with committing, even in the State which gave them being."

The decisions in Massachusetts to the effect that suits may be maintained against foreign corporations for any cause of action, no matter where it originated, were cases in which an agent had been appointed to receive service of process under a statute requiring this to be done before any business can be done within the State, and this involves a different question, which will be discussed later. What is decided by the cases just cited is that the mere fact that there is an agent in the State on whom process may be served, and that the law authorizes the suit to be brought against a foreign corporation by means of the service of such process, does not give jurisdiction over suits arising outside of the territory and having no connection with the business done there.

There are circumstances, however, under which a corporation seems to make itself peculiarly subject to the laws of a foreign State or country. It is notorious that corporations organized for

¹ The court cited *Bawknigh v. Liverpool, etc. Ins. Co.*, 55 Ga. 194; *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697; *Smith v. Mut. Life Ins. Co.*, 14 Allen, 386; *St. Clair v. Fox*, 106 U. S. 350; *News Co. v. Great W. Ry. of Canada*, 19 Mich. 336; *Parks v. Com. Ins. Co.*, 44 Pa. St. 422; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; but these cases do not all go so far as to maintain this proposition.

the very purpose of transacting business in one State are often organized in another, and it has become a common practice for corporations to establish a head office in a foreign State or country, and to transact there a large portion or the whole of their business. In such cases it has been said that the company has established a domicile there, and made itself subject to all the laws of the State. Its residence or citizenship for the purpose of Federal jurisdiction remains in the State of its origin;¹ yet it may be fully represented for all business purposes by head officers and general agents, and in such a case, if the local law provides for service of process on such officers or agents, it may perhaps properly be held subject to general jurisdiction in actions *in personam*.

In *Railroad Company v. Harris*,² the Supreme Court of the United States said that it was possible for one State by its legislation to recognize the corporation of another, so as to make it for certain purposes a corporation of its own; and where a railroad company chartered in Maryland had been authorized to use its corporate franchises in the District of Columbia and Virginia, and to build a continuous line, and had head offices in Washington, it was held that it was subject to an action in the District for an injury happening in Virginia to a passenger who had bought his ticket in Washington. The court said it could not be supposed that the legislature had intended to give such privileges to the corporation without giving a remedy in the courts of the District for actions arising within the territory. The plaintiff in this case was not a resident of the District, but the contract on which he sued was made there.³

Lord St. Leonards, in *Carron Iron Co. v. McLaren*,⁴ in his dissenting opinion, which has often been quoted with approval in American courts, said that jurisdiction to issue an injunction against a foreign corporation having an agent and place of business in England could be sustained, not on the ground of service upon the agent there, but because the company having houses and extensive business in England might be regarded as having a dom-

¹ *Remers v. Seatco Mfg. Co.*, 70 Fed. Rep. 573-577; *Shaw v. Milling Co.*, 145 U. S. 444; 6 Thomp., Corp., §§ 7997, 8029; *La Fayette Ins. Co. v. French*, 18 How. 404; *Smith v. Mut. Life Ins. Co.*, 14 Allen, 336; *Nichols v. Breen*, 72 Iowa, 239.

² 12 Wall. 65.

³ The court approved and followed *B. & O. R. R. Co. v. Gallahue's Admr.*, 12 Gratt. 658; *Gosham v. Supervisors*, 1 W. Va. 308; *B. & O. R. R. Co. v. Supervisors*, 3 W. Va. 319.

⁴ 5 H. L. Cas. 416-458.

icile there, so far at least as to give jurisdiction over transactions arising out of that business. "The corporation," he said, "cannot have the benefit of its place of business here without yielding to the persons with whom it deals a corresponding advantage."

In *Newby v. Van Oppen and the Colt's Patent Fire Arms Co.*,¹ it was held by the Queen's Bench that an American corporation, carrying on business in England, and having a general business office there, may be sued in an English court in respect to a cause of action arising there. The court said there had been no prior case at law, but that at least the service of summons should not be set aside.

This decision was followed and approved in the Court of Appeals in *Haggin v. Comptoir D'Escompte*,² and it was held that a French corporation which carried on an important part of its business in London, and had a banking house there, with head officers in charge of it, must be regarded as resident in London and subject to be sued there.

In that case the cause of action arose in England, but in an earlier case, before Vice-Chancellor Bacon,³ the suit was brought by a firm in Belgium against a bank organized in China for damages relating to the custody of goods in Japan, and service of process on the officers in charge of the defendant's banking house in London was held to be good.

The difference, however, between such a corporation and one that has an office in the State only for limited purposes is pointed out in a later case in the Chancery Division, where it was held that the service of process on an application for an injunction against an American Land Co., with an office in London, should be set aside.⁴

In these English cases, however, as in many recent decisions in England, the question was not whether a judgment of general obligation could be obtained, but whether the proceedings were authorized by the rules of court having the force of acts of Parliament.⁵

¹ L. R. 7 Q. B. 293.

² 23 Q. B. Div. 519.

³ *Lhoneux, Limon, & Co. v. Hong Kong & Shanghai Banking Co.*, 33 Ch. Div. 446.

⁴ *Badcock v. Cumberland Gap Park Co.*, 1893, 1 Ch. Div. 362.

⁵ The judgment of Lord Westbury in *Cooking v. Anderson*, 1 D. J. & S. 365, was overruled in *Drummond v. Drummond*, L. R. 2 Ch. App. 32, and Lindley, J. said, the question was not what jurisdiction the legislature ought to assume, but whether the legislature of this country has, in fact, authorized process to be served

In Massachusetts, jurisdiction over foreign corporations was formerly given only in suits begun by attachment, and in such cases no question of jurisdiction *in rem* could arise; but in suits brought by garnishee process it has been held that a foreign corporation having its executive offices in Boston was amenable to such process as a corporation having a "usual place of business within the State," and the court said it must presume that a judgment would protect the company in case it were sued elsewhere on the same debt.¹

Judge Lowell, in the United States Circuit Court in Massachusetts,² held that a suit might be maintained in the Federal court in that State against a foreign corporation without an attachment of property, and laid it down as a general proposition "that a trading corporation is of right suable in any country in which it conducts an important part of its business." The case, however, related to an infringement of a patent within the district.

None of these cases, except that of the Shanghai bank, goes so far as to decide directly that even in the case of an actual residence within the State, a foreign corporation would be amenable to suits by foreigners, or to suits having no relation to any business done within the State.

It may not always be easy to distinguish between cases of mere agency and cases in which there is established what is sometimes called a domicile within the State, and it is not necessary now to discuss the question whether a corporation can, in the proper sense of the word, have two domiciles;³ but if a foreign corporation does in fact have its head offices within the State, transacts its general business, and is represented there by its officers and managers, and

outside of the jurisdiction of the courts. If a decree should go against a person residing in a foreign country, it would be for the courts of that country to determine whether it should be enforced against him.

¹ *National Bank of Commerce v. Huntington*, 129 Mass. 444.

² *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93.

³ This has been much discussed in cases relating to garnishee process, but jurisdiction may be sustained in such cases on the ground that the corporation is found for the purpose of being warned not to pay the debt, and that validity of the garnishment does not depend upon the location of the debt, or the domicile of the debtor. See *Douglass v. Insurance Co.*, 138 N. Y. 209; *Mooney v. Buford*, 72 Fed. Rep. 32; *National Insurance Co. v. Chambers*, 53 N. J. Eq. 468; 32 Atl. Rep. 663; *Myer v. Liverpool, etc. Ins. Co.*, 40 Md. 595; *National Bank of Commerce v. Huntington*, 126 Mass. 444. As to domicile for the purpose of jurisdiction, see *Carron Iron Co. v. McLaren*, 5 H. L. Cas. 416-449, 459; *Nat. Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 495; *Dacey, Dom.* 110, 112; 6 *Thomp., Corp.*, §§ 7999, 8000.

if the laws authorize service upon it there, it may well be considered as having a domicile there for the purposes of jurisdiction; and there would seem to be no good reason why it should not be subject to be sued there for all purposes, and without regard to the origin or nature of the cause of action.

There are in some States statutes expressly defining the jurisdiction of the courts over foreign corporations. The Civil Code of New York,¹ which has been followed in many other States, provided that an action against a foreign correspondent might be brought (1) by a resident of the State for any cause of action, (2) by a plaintiff not a resident of the State, where the action is brought upon a contract made within the State, or the cause of action arose, or the subject-matter of the suit was situated, within the State. Under this provision it was held by the Court of Appeals of New York,² that a non-resident of the State could not maintain an action against a foreign corporation where the cause of action arose outside of the State, and no question was made in that case but that a resident might maintain a suit against such a corporation for any cause of action. It was said by Earl, J., that the distinction between the privileges of residents and non-residents in this respect was not unconstitutional; but the court was not called upon to decide upon the validity of a judgment recovered by a resident against a foreign corporation in a cause of action arising outside of the State.

Such a judgment would not be good unless the corporation had transacted business within the State, and process were served upon some officer or agent authorized to represent it there;³ and if it were so served, the judgment would only be good on the principle that the statute of the State imposed this condition upon a foreign corporation doing business within its borders, and that the defendant, having come there by its agents, had by implication accepted this condition and so consented to the jurisdiction even over causes of action arising elsewhere. If the statute is explicit and the condition is distinctly imposed, it would seem that the corporation must be held to have submitted to the jurisdiction.

The same principle applies to cases arising under the statutes requiring the appointment of an agent to receive service of proc-

¹ Section 427.

² *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315; *Palmer v. Phoenix Mut. Life Ins. Co.*, 84 N. Y. 63; 6 *Thomp., Corp.*, § 8007.

³ *St. Clair v. Cox*, 106 U. S. 350; *Moulin v. Trenton Ins. Co.*, 24 N. J. L. 222.

ess. The appointment of the agent secures the presence of a person who represents the company, and if the statute expressly provides for service of process in any cause of action wherever arising, then if the company do transact business within the State, it may be taken to have consented to accept service of process in all actions which the courts of the State are competent to determine.

It has frequently been declared by the Federal as well as the State courts, that since a State has a right to exclude a foreign corporation altogether, it may impose conditions under which alone it may come within the State, and that if the corporation avails itself of the privilege, it must be taken to have accepted the conditions. This was the principle laid down by Mr. Justice Curtis in *La Fayette Insurance Co. v. French*,¹ in sustaining jurisdiction over a foreign corporation with respect to a contract made within the State, and he said such conditions must be deemed valid in other States, "if they were not inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity of defence." The Supreme Court has since then repeatedly decided that a State may impose such conditions as it pleases upon the doing of any business by a foreign corporation within its borders, and that unless the condition be complied with the prohibition is absolute;² and in *Hooper v. California*³ Mr. Justice White says, "The principle that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State, has long been settled, and many phases of its application have been illustrated by the decisions of this court," and he refers to *La Fayette Insurance Co. v. French*, and to many cases relating to franchises and taxes.

If, therefore, it be made an express condition of doing business within the State that a foreign corporation should submit to be sued there by any person for any cause of action arising anywhere, there would seem to be no doubt that on appointing an agent under such a statute, and so transacting business in pursuance of the leave so given, a foreign corporation would be taken to have consented to the condition, and that the service of the process would be good. The jurisdiction over the person of the

¹ 18 How. 404.

² *Allgeyer v. Louisiana*, 165 U. S. 578.

³ 155 U. S. 648.

defendant would be established by the consent of the defendant to be regarded as found within the State in the person appointed as agent for that purpose, and the corporation would be subject to the judgment of the court over any cause of action of a transitory character without regard to the place where it actually arose. The condition may be unreasonable if it goes beyond any proper purpose, but it could hardly be considered as being in conflict with the principles of public law.

The question remains, however, whether the statute is so explicit as to be clearly intended to require a foreign corporation to submit to suits having no relation to the business done within the State, or to suits brought by persons that are citizens of the State where the corporation was organized or of some other foreign State.

With respect to actions transitory in their character, with which by common consent the court of any State is competent to deal, it is a question of the construction of the statute imposing the condition rather than a question of jurisdiction between States, and the decision of this question of construction depends a good deal upon the opinion of the court with regard to the policy and purpose of legislation of this character, and there is difference of opinion in the few cases in which the question is directly involved.

Judge Wheeler, in a case decided in Vermont in 1874,¹ expressed very strongly the opinion that a statute providing for the appointment of an agent on whom process might be served ought not to be construed as intended to permit a non-resident to sue a foreign corporation for a cause of action arising outside of the State. He said that even assuming that the agent in that case had been appointed in obedience to the statute, the question still remained, what cases the statute was intended to reach. A statute is to be construed with reference to the old law, the mischief, and the remedy. When this statute was passed the old law permitted the agents of any insurance company, foreign as well as domestic, to make contracts of insurance within the State under which causes of action would accrue to our own people within the jurisdiction of the State courts. The mischief was that the jurisdiction of the State courts over these causes of action would be unavailing except upon voluntary appearance, for want of power in the courts to compel appearance. The remedy provided was the requiring of

¹ *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697.

any foreign insurance company making such a contract to keep an agent in this State on whom service could be made. This would be a full remedy for all that mischief, without requiring such companies to keep an agent here on whom any process for any purpose could be served. There could be no advantage obtained for the people of the State by providing means to give the courts of the State jurisdiction over causes of action that accrued out of the State, in favor of persons not citizens of the State, against a corporation existing out of the State; and it is not to be presumed that the legislature intended to accomplish that purpose unless that is the necessary result of the enactment. It is more reasonable to suppose that the intention was to provide a method for obtaining jurisdiction over a defendant to a cause of action the courts had jurisdiction of before, than that it was to provide means for obtaining jurisdiction of a cause of action where none was had before, and of the parties also by the compulsory appointment of an agent; and he referred to *Smith v. Ins. Co.*, 14 Allen, 336, and *Camden Rolling Mill Co. v. Swede Iron Co.*, 3 Vr. 15.

On the other hand there are several more recent cases in which a different view is taken, and the statutes are construed as giving jurisdiction in suits brought by non-residents and over causes of action transitory in their nature arising outside of the territory.

In a case in Massachusetts in 1882,¹ a resident of Delaware brought suit against an insurance company organized in New Jersey and having an office in Boston, on a policy issued in Pennsylvania on property in Delaware, and summons was served on the insurance commissioner in Boston in pursuance of the statute. (Gen. Stats. 1878, ch. 36.) This decision was approved and followed in a recent case in the United States Court of Appeals for the Seventh Circuit.²

This was a case of garnishment proceedings, and it was held that the jurisdiction to attach a debt did not depend upon the question of the situs of the debt, but upon the control obtained over the debtor by means of process duly served, and that such service might be made upon the agent of a foreign corporation appointed under the statute, even though the debt arose out of a contract made and to be performed in another State.

¹ *Johnson v. Trade Ins. Co.*, 132 Mass. 432.

² *Mooney v. Buford & George Mfg. Co.*, 72 Fed. Rep. 32; 34 U. S. App. 581.

The court said that it was notice to the debtor which gave the plaintiff in garnishment a lien upon the debt, and that if in the ordinary case of a foreign attachment a valid judgment could be rendered against a resident debtor, there was no reason why such a judgment should not be rendered against a foreign corporation which by law and its own consent had become subject to the service of process in the State where sued as if served with process there. The court referred to a recent case in New Jersey,¹ in which the same conclusion was reached. In that case the able argument of Vice-Chancellor Pitney is directed against the doctrine of the New York Court of Appeals in *Douglass v. Insurance Co.*² with regard to the jurisdiction over the debt in cases of foreign attachment, and he holds that it is service of notice upon the debtor and not the situs of the debt that gives jurisdiction, and he asserts that for the purpose of such notice and for the service of process a corporation may have two domiciles.

In a recent case in Mississippi,³ it was declared to be well settled in that State that an action might be maintained by a non-resident against a foreign corporation for a tort arising outside of the State, and a demurrer to a plea to the jurisdiction in such a case was overruled. The decision was put upon the ground that the courts of the State were open to all suitors in all transitory actions against non-residents as well as residents, whether natural persons or artificial, provided only process were served or appearance were entered; and the court said that the question in the case before it was settled by the fact that a statute provided that foreign corporations should be liable to be sued or proceeded against by attachment or otherwise, as individual non-residents might be sued or proceeded against. The service in that case was made not upon an agent appointed to receive service of process, but upon the conductor of a railroad train, and the decision wholly ignores the question whether the corporation was in fact found within the State, or whether the conductor of a train could be held to represent the company with respect to an injury committed by another servant in another State. It is well settled in the Supreme Court of the United States and by the great weight of authority that service can only be made upon such agents as may

¹ *Nat. Fire Ins. Co. v. Chambers*, 53 N. J. Eq.

² 138 N. Y. 209.

³ *Pullman Palace Car Co. v. Lawrence*, Miss., May 24, 1897, 22 So. Rep. 53.

properly be deemed representatives of the corporation,¹ and the Supreme Court of Mississippi therefore has missed the real point on which the question of jurisdiction in such cases turns.

It is not the purpose of this article to attempt to reach definite conclusions. It must suffice to call attention to the principles and to refer to the judicial opinions on both sides, and it may be added that Mr. Thompson, in his work on Corporations, reaches the conclusion that although judicial opinion has not been uniform, yet the weight of authority is that, in the absence of statutes enlarging the jurisdiction of domestic tribunals, a foreign corporation cannot be sued for torts committed in a foreign State, and that the general rule, when not changed by statute, is that foreign corporations are suable in domestic tribunals only upon causes of action arising within the domestic jurisdiction.²

Whatever may be the true rule with respect to actions of tort and other merely transitory actions, there is no doubt that there are questions relating to a foreign corporation with which the courts of a State will refuse to deal. It is true, as was said by Wells, J., speaking for the Supreme Judicial Court of Massachusetts in 1867,³ that the service of process on a foreign corporation can have no greater effect than a waiver of service, nor remove objections to the jurisdiction on the ground of the subject-matter of the controversy, nor obliterate the fact of the non-resident character of the defendant. While ordinary actions are transitory in their nature, there are, as he said, liabilities of local concern which the tribunals of other States will not enforce; as, for example, liabilities under the usury laws or penal statutes, or liabilities of a penal character of officers or directors of corporations for corporate debts;⁴ and he held in that case that a court of equity would not entertain a bill brought by a citizen of Alabama, seeking to restore him to his rights under a policy of insurance in a mutual

¹ *St. Clair v. Cox*, 106 U. S. 350-356; *U. S. v. Telephone Co.*, 29 Fed. Rep. 17; *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150. See *Mackereth v. Glasgow, etc. Ry. Co.*, L. R. 8 Ex. 149, where the ticket agent of a foreign railway company was held not to be a head officer or clerk on whom process could be served in England.

² 6 *Thomp., Corp.*, §§ 8007, 8008. See also 1 *Rawle's Bouvier's Law Dict.*, p. 817, tit. "Foreign Corporation," where the authorities on this whole subject are collected.

³ *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336.

⁴ *Gale v. Eastman*, 7 Met. 14; *Campbell v. Sheldon*, 13 Pick. 8; *Campbell v. Wallace*, 10 Gray, 162; *Halsey v. McLean*, 12 Allen, 438; *Derrickson v. Smith*, 27 N. J. Law, 166. (The decision in *Huntington v. Attrell*, 146 U. S. 697, was that the liability was not of a penal character.)

company organized in New York. So also it has been held that a court of equity will not entertain a suit by stockholders to restrain or redress frauds or breaches of trust on the part of officers or directors of a foreign corporation,¹ and that even where there is a statute authorizing service of process, the courts have no visitatorial power over foreign corporations, nor jurisdiction to regulate their internal affairs.² Even though provision be made for the service of process upon foreign corporations, the Courts are left free to determine whether they will take jurisdiction of the subject-matter of the controversy or administer the relief which the case requires. The discussion of this subject involves questions of expediency and of power to enforce decrees as well as questions of jurisdiction, and these questions are not within the purposes of the present discussion.

Edward Quinton Keasbey.

NEWARK, N. J., March, 1898.

¹ *Thomp., Corp.*, §§ 4479, 8011; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Wilkins v. Thorne*, 60 Md. 253; *Moore v. Silver Valley Min. Co.*, 104 N. C. 354; 10 S. E. Rep. 679-683.

² *Mining Co. v. Field*, 64 Md. 151; 20 Atl. Rep. 1039; *Republican Mountain Silver Mines v. Brown*, 58 Fed. Rep. 644; 7 C. C. A. 412.

On the question in what cases courts will exercise jurisdiction over causes of action arising in foreign countries, or beyond their own territories, see the notes to *Mostyn v. Fabrigas*, 1 Smith's Leading Cases, 652, and the opinion of Judge Bradley *In re The Belgenland*, 114 U. S. 355.

THE ELEMENT OF CHANCE IN LAND TITLE.

I.

IN respect of inquiry into title, there is ordinarily a wide difference in practice, as between chattels personal, on the one hand, and land and chattels real, on the other. It is true that in certain classes of dealings with chattels personal, — as in the taking of railway mortgages, in the purchase of corporation stock, and in the lending of money upon mortgages, — there commonly is a formal examination of title, covering such written data as exist in an available form, and including inquiry into some other matters, such as possession. It is also true that in some parts of the country, — chiefly, perhaps, in the long-settled rural communities of the East, — dealings in land are very commonly made with little or no examination of title. Nevertheless it may be laid down as a general proposition that most dealings with chattels personal are made without formal examination of title, while in dealings with land, and with chattels real other than unimportant leases, there is ordinarily some formality of examination, varying with the circumstances of different transactions and with the customs of different communities.

The difference in practice, in respect of these two classes of property, is to a considerable extent arbitrary. It is not based upon lack of data, or even lack of record data, in respect of title to chattels personal, as a class; for, in a multitude of instances where no examination of title is made, there exist definite and available data of title, often in writing, if not in the form of public record, — as, for example, in the case of chattels personal sold by business houses upon the instalment plan. Nor does the difference in practice rest upon a difference in value or importance between the two classes of property. Dealings, without examination of title, with chattels personal, involve in the aggregate vast sums of money, and relate, in a multitude of instances, to articles of great value and of considerable permanency, such as heavy machinery; and, on the other hand, numberless instances of dealings in real estate, attended by strict formality of examination into title, involve only small values.

The difference in practice, in respect of these two classes of property, rests partly upon mere tradition and habit, capable of no justification by argument; partly upon a long experience of the substantial safety of proceeding, in respect of the one class, without examination into title, and of need, or, at least, convenience, of examination into title, in respect of the other class.

In respect of land, and chattels real, the practice of formal examination is, perhaps, as much a matter of habit and tradition as of intelligent precaution; for, in those communities where it is customary to deal in real estate with little or no examination into title, there is no greater sense of insecurity, and probably no greater percentage of actual loss, than in communities where there is a detailed and formal examination. In communities of the latter class the chief practical importance of examination to a given purchaser is, perhaps, the protection that it affords, not so much against loss, but against criticism by subsequent purchasers.

The writer does not wish to criticise the custom of dealing in land with little or no examination of title; on the contrary his observation has led him to the opinion that in the communities where that custom is generally followed, it works very well, and that under the system of land title now prevailing in this country, the defects most likely to involve loss are those which would not be disclosed by formal examination. He recognizes, however, the fact that it is in only a limited class of communities that the simple custom prevails, and that in even those communities it is liable at any time to be brought to an end, by rise in value of the land, or the introduction of a new class of purchasers. He recognizes, therefore, the practice of formal and detailed examination as the prevailing American practice, and he desires here to treat the question how far that practice, as it exists, is complete and systematic, and to what extent it eliminates the element of chance.

The characteristic feature of most dealings in chattels personal, and of such dealings in land as are had without formal examination, is the taking of chances. Elaborate examination proceeds upon the theory that, unless in simple communities and in unimportant instances, chances should not be taken. There is an implied assertion, on the part of conveyancers, or at least a general belief of clients, that the present stricter form of examination substantially covers the field of possible defects, or at least all such features of title as can be inquired into. Perhaps it is not too much to say that the very existence of the practice of elaborate examination

amounts to a profession that such degree, extent, and features of inquiry as are practicable shall not be arbitrarily renounced in favor of the element of chance.

But in fact, the system of elaborate examination, as it is practised, has no just claim to completeness or symmetry. Not only is it incomplete, but it is arbitrarily incomplete. It makes arbitrary selection of the features of title with which it will and with which it will not deal; and while it appears to condemn the deliberate taking of chances, it nevertheless does admit that element into title, as distinctly, — although, of course, not as largely, — as does the system of little or no examination.

In a former article in this Review¹ the present writer pointed out a number of essentials of title, nowhere to be discovered of record, and almost invariably taken on trust. Among these were: the genuineness of signatures of grantors and of certifying magistrates in recorded deeds; jurisdiction and authority of such magistrates; status and identity of persons professing to be heirs, and to be all the heirs; sanity; full age; the fact and the validity of marriage; the fact and the validity of divorce, in its direct operation (in respect, for example, of inchoate dower), and its indirect operation (as the basis of subsequent marriage); prescription; adverse possession; identity of physical boundary marks; the fact and the validity of votes of domestic and of foreign corporations; death; servitudes created by acceptance of a deed of other land; loss of an easement by executed parol license;² loss of title by election (as, by accepting, under a will, a benefit inconsistent with the retaining of the recipient's own land).

Other examples may be suggested.

(1) In Massachusetts, a town (and probably a religious parish) may convey land by vote, without a deed. In such a case the transfer will not appear upon the ordinary land records.

(2) A deed of land may be so framed as to leave the question of boundaries practically a mere question of oral agreement: as, where a deed bounds simply by the grantor's "other land," and the boundary line is fixed merely by the setting of stakes.³

(3) Metes, given in a deed in such form as, upon mere construction, to be controlling, may have been controlled by acts of the parties at the delivery of the deed.⁴

¹ "Record Title to Land," *HARVARD LAW REVIEW*, vi. 302.

² *Boston & Maine R. R. v. Doherty*, 154 Mass. 314, and *cas. cit.*

³ *Hooten v. Comerford*, 152 Mass. 591.

⁴ *Dodd v. Witt*, 139 Mass. 63.

(4) Declarations of the owner of land, made on the land, in disparagement of his title, — as, for example, admissions of an easement upon it, — are admissible in some, if not all, of the States, as against subsequent owners, although not known to them when they purchased.¹ It may well happen that the declarations were made by the person who alone knew the fact in question, and were made under such circumstances, and have such corroboration, that, if the making of them be proved, they will almost with certainty operate to limit the title. In many cases the situation is such that a given purchaser cannot protect himself against the possibility of such declarations having been made. In those cases he must take the title, so far, upon trust. And where the persons who may have made such declarations are living, the only way of covering the field with any certainty is to resort to depositions *in perpetuam*.

(5) Under the rule of *lis pendens*, a court having jurisdiction of a cause which may affect by its judgment the title of land, has, as a necessary incident of jurisdiction, a right that the title shall not be interfered with until after opportunity for operation of the judgment; and therefore, as against the judgment, a conveyance *pendente lite* is of no effect, but the purchaser takes subject to the judgment. It is ordinarily the defendant whose grant *pendente lite* would, if effectual, interfere with the operation of the judgment; but it may be the plaintiff.² Except in so far as this rule may, in respect of a given region, have been qualified, and effectually qualified, by statute, an examiner of title, to be exact, should search the records of all courts capable of jurisdiction, to see that there is no such pending suit. It is true that in many, and perhaps in all, of the States, it is provided that, to make *lis pendens* operative, there must be filed in the registry of deeds a notice of the suit. In Massachusetts such a provision has been in force since 1877. It is believed, however, that prior to the passage of that act, it was never the practice in Massachusetts to take precautions against *lis pendens*, although the enactment of the statute was a confession that there had been an element of danger in that respect.

But State *lis pendens* statutes of this class, while capable of affording effectual protection against suits pending within the courts of the State, are by no means completely effectual. A suit

¹ 1 Greenleaf, Evidence, § 109; Blake v. Everett, 1 Allen, 248; Pickering v. Reynolds, 119 Mass. 111.

² Pomeroy, Eq. Jurispr., par. 638; Henderson v. Wanamaker, 25 C. C. A. 181; 79 Fed. Rep. 736.

pending in a Federal court sitting within the State is as completely operative in respect of title to land within the State as a suit in a State court; but State statutes cannot force a Federal lien upon the State records;¹ and it would seem, by parity of reasoning, that they cannot so affect any form of priority having its foundation in the Federal Constitution and laws. Undoubtedly such classes of Federal liens as are mere matter of procedure at law (as, the lien of mesne attachment, in an action at law, under the Massachusetts practice), may be, and in the Massachusetts district, at least, are, provided for by rule of the Federal court, requiring notice upon the State records, as in the State practice; but this courtesy, however far it may be carried in respect of actions at law, has no place in the Federal equity procedure in respect of *lis pendens*. The writer has never known of systematic precaution against such Federal suits. In Massachusetts, certainly, the question of the possible existence of such a priority is, as a rule, left to chance.

There is a further possible operation of *lis pendens*. It is by no means clear that it has not an extra-territorial operation, from one State into another. The reason of the rule of *lis pendens* seems to require a disregard of State lines; and it has been more than once held—without, however, any discussion of a possible limiting effect of a *lis pendens* notice statute—that a suit pending in one State has such extra-territorial operation in another State.²

It is possible that a State statute requiring record notice of a pending suit may operate against a suit in a court of another State. The ordinary form of statute of this class, however, would perhaps not be construed to intend such an operation; and, moreover, the extra-territorial force of a judicial proceeding of a State stands upon the Federal Constitution as truly as does a Federal lien, such as was in question in *United States v. Snyder*; and it well may, therefore, like such a Federal lien, be within the principle of *United States v. Snyder*, and thus not subject to control by a State recording statute.

It is not the object of this article to argue unsettled questions; but it is proper to point out that the doctrine of *lis pendens* offers, in respect of many Federal suits, and perhaps in respect of suits in other States and in other Federal districts, at least a possibility of defect, in every title, as serious as many a possibility against which a conveyancer provides with minute care.

¹ *United States v. Snyder*, 149 U. S. 210.

² *Bennett, Lis Pendens*, § 83; "*Territorial Extent of Lis Pendens*," and *cas. cit.*

(6) Distinct from the operation of *lis pendens* is the operation of a judgment. Title may, of course, be divested or qualified by a judgment, as well as by deed. Yet, in many of the States, there is no provision for convenient notice of such judgments. In Massachusetts, notwithstanding the passage, in 1877, of the *lis pendens* statute, no provision was made in respect of convenient notice of change of title by judgment until 1892, when such notice was required to be filed in the registry of deeds;¹ and even this statute would appear to reach only domestic judgments of the courts of Massachusetts.

(7) The Federal lien for internal revenue taxes² is, at least in the East, ordinarily ignored. There are in this country thousands of landowners who are manufacturers of tobacco, or distillers, or brewers, and there must be frequent and important sales of land by them. All real estate, of whatever nature and wherever situated, owned by any such person, is subject to a lien for internal revenue taxes due from him.³ The tax rate is heavy, and a tax may, in a given case, amount to a large sum.⁴ The lien is not subject to State legislation, in respect of requirement of record notice,⁵ and is effectual as against an innocent purchaser for value.⁶

In the case last cited the facts were as follows: The defendant was, in 1878, a tobacco manufacturer in New Orleans, and became indebted for taxes in the sum of several thousand dollars. He was the owner of real estate in Louisiana. The Constitution of that State provided that no "privilege" on real estate should be effectual unless registered in a certain State office. It was not denied that the word "privilege" included liens; and the lien in question was not registered in accordance with the requirements of the State Constitution. In 1881, the tax remaining unpaid, Snyder sold and conveyed his property to an innocent purchaser. Four years later the United States began suit to enforce the lien, making the purchaser a defendant. It was contended that the lien was ineffectual as against the purchaser; but the court held otherwise, and enforced it.

(8) The matter of divorce has been alluded to above, with reference to its bearing on dower and on the validity of subsequent marriage. There is another aspect of it, material to the question

¹ St. 1892, c. 289.

² U. S. Rev. Sts., § 3186, as amended by Act of March 1, 1879, § 3; § 3207.

³ Sts. above cited.

⁴ U. S. Rev. St., §§ 3251, 3368.

⁵ *United States v. Snyder*, 149 U. S. 210.

⁶ *Ibid.*

of land title, and yet but little discussed in the East. A number of the States have divorce procedure statutes based, in a certain sense, upon the theory of alimony, but differing widely from that theory, and providing, in one form or another, for an allotment of property of one of the parties to the other party. These statutes differ widely in their particulars, some relating only to real estate, some to both real and personal estate; some professing to allot property by their own force, without aid from the decree of the court, others leaving the allotment to the court.¹ In some of these statutes, no distinction is drawn between petitioner and respondent, or between husband and wife, but property of either may be allotted to the other. It is, of course, not uncommon for a husband or wife who wishes a divorce to create a domicil in a distant State with a view to a divorce; and even where an effectual change of domicil is not effected there may be a colorable change. Under the doctrine which now generally prevails in this country, and may fairly be said to be established, a decree of divorce effectual to dissolve the marriage tie may be made without such personal jurisdiction over the respondent, whether husband or wife, as would be essential to an ordinary personal judgment.² Moreover, a wife physically absent may have been physically a resident, and may in law, by reason of the marriage, still be a citizen, of the State, taking jurisdiction; and even where a respondent wife has never been physically within such State, still, if she is living apart from her husband without sufficient cause, the courts of the State of his residence may have jurisdiction over her, as over any other citizen, and may hold her, by substituted service, to a decree, operative *in personam*, and operative upon her property outside the State, through the medium of a judgment in another State based upon the original judgment. The whole question of divorce and its incidents is one of great complication; but there is no doubt that the petitioner may be bound, in respect of his or her property outside the State, by a decree of allotment of it to the respondent; and there are situations under which he or she might get a judgment probably enforceable as against real estate of the respondent in another State. It would seem to follow that where one step in a chain of title is divorce in another State, the examiner should, if his examination is

¹ 2 Bishop, Marriage, Divorce, and Separation, §§ 1117 *et seq.*

² 2 Bishop, Marriage, Divorce, and Separation, §§ 137, 153, 185; 2 Black, Judgments, §§ 925, 928, 932; *Pennoyer v. Neff*, 95 U. S. 714, 734.

to be exhaustive, look into the question of such statutes in the State granting the divorce, and into the record of the divorce suit.

(9) Constitutional law receives very little attention in the examination of titles. Objection to a title based upon constitutional grounds would, unless supported by a decision precisely in point, ordinarily be viewed as fine-spun; and a conveyancer who should profess to have made a careful study of State and Federal constitutional law with a view to titles, and should be in the habit of discussing the constitutionality of State statutes, or a possible limitation of their operation by reason of the Federal Constitution, would, unless of unusual force, lose credit for good judgment, though his learning might be sound, and the questions sensible and important. There was, it is true, a long period in the history of this country when, owing to the comparative simplicity of the questions commonly in dispute in land-title and the common-law character of those questions, to the absence of the great variety of modern statutes providing for the extinguishment of defects in title, and owing, further, to the lack of the provision which came into force with the Fourteenth Amendment, constitutional difficulties could, perhaps, be said, as a class, to be mere bugaboos; and at that time a conveyancer known to be apprehensive of constitutional difficulties might be viewed with a critical eye. To-day, however, we are in a new era of land-title. In the older of the thickly-settled communities the writ of entry is obsolete, and disputed questions of title, in so far as they are questions of law, frequently turn, not upon common law principles or upon statutes confessedly dealing only with matters of State cognizance, but upon principles of general equity jurisprudence, as declared or as enlarged by statute; upon the competency of State statutes to bind persons not in being, or not ascertainable, non-residents, and the like. Notwithstanding this change, there still remains a good deal of the old half-disguised contempt for constitutional law in respect of the daily handling of real estate titles.

A striking illustration of this is afforded by the fact that the two enactments which have been made in this country approximating to the Torrens legislation, were both unconstitutional.

The legislation of most of our States abounds in modern statutes aimed at the clearing of titles from apparent adverse interests vested, if they exist, in persons outside the jurisdiction, or not as yet in being, or not ascertainable; and titles are being passed every day upon the faith of such statutes. It is competent to our

State legislatures to pass statutes of this class almost without limitation of extent. There is, however, a strict limitation in respect of the form in which the legislative power can be exercised; and yet there is great inattention to this limitation, in the framing of such statutes, and in passing titles under them. The principles upon which the efficacy of legislation of this kind turns, are few and simple. They may be summarized as follows: (a) Under the principles of general equity jurisprudence, a decree in equity operates only upon the defendant, and cannot be made effectual without jurisdiction of his person. (b) Except, perhaps, in a limited class of cases, where the rule of suing only representative defendants may be invoked, the defendants must be in existence, and ascertainable and known. (c) The State legislatures have the power of making extensions of ancient equities and equity procedures, and such extensions have the force, and are entitled to all the recognition, of the ancient equities and procedures. (d) This legislative power covers all the ancient equities relating to the clearing of titles. (e) Under this power a State may, by statute, dispense with all the limitations existing in the ancient equity jurisprudence, and may provide for a decree operative as against non-residents, persons not in being, and persons unknown, or not ascertainable, and may provide for the operation of the decree directly *in rem* upon the land, or for the setting up of a substitute, or quasi-trustee, to give a deed of release in behalf of possible hostile claimants not personally within the jurisdiction.

The phraseology necessary to the effectuality of such statutes has been repeatedly declared by the Supreme Court of the United States, and notwithstanding the difficulty originally existing in the subject, nothing has been easier, for a considerable time past, than to insert in a new statute the phrases essential to its validity, the chief of which is a provision in terms that the decree shall operate directly upon the land, or that there shall be a substituted grantor. Nevertheless, throughout the country there are statutes of this class, which are drawn without the least attention to these principles, and titles are constantly being made under them without the slightest regard to the question of their constitutionality. In the Massachusetts legislation there is no uniformity in this respect: some of the modern title-clearing statutes have been drawn in strict accordance with the constitutional requirements, while others make no provision either that the decree shall operate *in rem* upon the land, or that there shall be a substituted releasor. The writer has

no occasion, in respect of any given statute, to argue that it is unconstitutional. It is sufficient for his present purpose to point out that such statutes as he has last mentioned are often drawn without an eye to the constitutional requirements; that it is only by aid of construction, if at all, that they can be held to be constitutional; that it is only a matter of good fortune if they are constitutional; that statutes which it is difficult to distinguish from them in phraseology have repeatedly been declared unconstitutional; and that such statutes, in actual conveyancing practice, pass current as freely as statutes unquestionably constitutional.

Another familiar class of statutes affecting titles, are those which profess to bring in non-resident defendants by advertisement, and subject them to a personal judgment.¹ It seems quite clear that a judgment under such a statute was not valid, out of the State in which it was rendered, even prior to the Fourteenth Amendment,² or even within the State.³ Under such a statute, however, an execution title, perfect in form, might be got. The decision in *Pennoyer v. Neff* was rendered in 1877. In Massachusetts, — as, probably, in other States, — things nevertheless went on smoothly, and such judgments continued to be rendered, at least as late as 1880.⁴ As late as 1885, a suit was maintained upon such a judgment.⁵ So things stood in Massachusetts, until 1887, when it was held, on the authority of *Pennoyer v. Neff* and of *Freeman v. Alderson*,⁶ that a writ of error would lie to reverse such a judgment.⁷ The next year it was decided that such a judgment might be attacked, and treated as a nullity, collaterally.⁸ No one knows how many apparent titles have been made in different States, under statutes of this class, before and since the Fourteenth Amendment; nevertheless, most conveyancers, at least in the East, would have passed such a title, unless the ineffectuality of such statutes had been forced upon their attention by a decision in the courts of their own State. Indeed, nothing could be more significant of the disregard often paid to constitutional difficul-

¹ See Mass. Gen. Sts., c. 123, §§ 23-28; c. 126, § 6; Pub. Sts., c. 161, §§ 29-34; c. 164, § 6 *et seq.*

² *D'Arcy v. Ketchum*, 11 Howard, 165.

³ *D'Arcy v. Ketchum*; *Pennoyer v. Neff*, 95 U. S. 714.

⁴ See *McCormick v. Fiske*, 138 Mass. 379.

⁵ *McCormick v. Fiske*, above cited.

⁶ 119 U. S. 185.

⁷ *Eliot v. McCormick*, 144 Mass. 10.

⁸ *Needham v. Thayer*, 147 Mass. 536.

ties, than the fact that the Supreme Court of Massachusetts — a court of learning, and always courageous in respect of constitutionality — did not have present to its attention, in 1885, the law of *Pennoyer v. Neff*.

In closing, the writer desires to say, what he has said above, that he does not present these considerations as an alarmist; but that, on the contrary, he has quite as much faith as any one, and probably more faith than most members of his profession, in the safety of the practice of taking title, as a rule, with little or no examination; and that his main object in this article is to point out that the elaborate form of examination of title, where it is practised in this country, is neither complete nor even systematic in its omissions; that its selection of elements for examination and for omission is based upon no considerations of relative importance or relative percentage of risk, but upon habit and tradition; and that such arguments as there are, — and they are many and weighty, — in favor of an elaborate examination, logically call for an examination very different from what is made by even the best conveyancers to-day. It is his aim also to suggest that the possible defects in a given title in this country, under our system of government, are such and so numerous that if we are to have any approach to a really authoritative assurance of title, we need, in our States, a logical rounding-out of our present legislation, to its full constitutional limits, so that in the ninety-nine cases in a hundred where unknown possible defects do not in fact exist, there may be relief from the necessity of investigation into the question of their existence, and a sweeping and effectual decree of exclusion of them. Finally, he has desired to bring to notice the consideration, that, for any approach to completeness, the co-operation of Congress must be invoked in respect of those classes of possible adverse interests which, if they exist, rest upon the Federal Constitution and laws in such sense as to be thereby exempt from State legislation.

H. W. Chaplin.

CONTRIBUTORY INFRINGEMENT OF PATENT RIGHTS.

UNDER the statute of the United States which enacts that the patentee for a new and useful invention shall have the exclusive right to make, use, and vend his invention or discovery (Rev. Stat. U. S., sec. 4884), cases without number have been disposed of by the Federal courts. Sitting in equity, the courts in terms enjoin the infringer of patent rights from "directly or indirectly" making, using, selling, etc., the subject-matter exclusively controlled by virtue of the patent grant; and, generally speaking, no argument need be wasted in support of the proposition that no man may do indirectly that which he may not do directly. But under conditions growing out of one well-established rule of patent law there have appeared several instances where, at first glance, it seemed that persons charged with individual infringement of patent rights might escape the legal consequences of their acts.

The patent grant rests upon, and is the expression of, a contract between the inventor of new and useful improvements in the arts, on the one hand, and the public, on the other; whereby, in consideration of the disclosure to the established agent of the public — the Commissioner of Patents — of a full and accurate description of the newly invented improvement, a monopoly of manufacture, sale, and use of the invention is granted to the inventor for a term of years, with a remainder, as it were, in fee to the public.¹ For this reason it becomes indispensable to the public to have a distinct recital in the grant, of the nature and limitations of the subject-matter which is thus secured to the patentee. Therefore, the statutes require the applicant for patent to set forth as part of his patent grant the exact metes and bounds of the substance he claims to be his invention and for which he is entitled to the monopoly.² This statement is the patent claim. Usually the claim is for a new combination of correlated parts, as

¹ *Grant v. Raymond*, 6 Pet. 218.

² Revised Statutes of the U. S., sec. 4888.

of a machine; and the patentee can control only embodiments of the claim, with a fair and proper reservation of equivalents for accomplishing the result at which his invention is aimed.

When, therefore, a patentee sues for infringement of his rights, one of the main questions for solution is whether the defendant has accomplished substantially the same result as that contemplated by the patentee, in and by substantially the same means as are specified by the patent claim. If the defendant has accomplished the useful result by using all of the component elements of the claim, he is an infringer; but if, on the other hand, he has managed without one or more of those components or their substantial equivalents, he escapes the charge; for the claim is read as an integer.¹

Broadly speaking, the manufacture, sale, or use of an element of the combination, or of any number of elements in combination short of the complete whole recited in the claim, is innocent.

This rule was invoked for the defendant in the leading case of *Wallace v. Holmes*,² where the facts stood thus:—

The complainant patentee had a patent for an improved burner in combination with a peculiar chimney, in a lamp; the defendants manufactured and sold the burner, leaving the purchasers to supply the chimney, without which the burner was useless. The lamps in the hands of purchasers from the defendants became complete infringements of the patent claim.

“And now it is urged that, having made and sold burners only, they are not infringers, even though they have distributed them throughout the country in competition with the complainants, and have, to their utmost ability, occupied the market, *with the certain knowledge that such burners are to be used, as they only can be used, by the addition of a chimney.*”³

The italics in the foregoing quotation from Judge Woodruff's opinion are intended to emphasize that portion of the facts which is, it is submitted, the key to the situation. The defendants in

¹ A combination claim does not cover the elements separately. *Evans v. Eaton*, Pet. C. C. 322. The whole combination is a unit. *Watson v. Cunningham*, 4 Fisher, 528; *Rowell v. Lindsay*, 10 Biss. 217; *Schumacher v. Cornell*, 6 Otto, 594; *Gill v. Wells*, 22 Wallace, 1.

A claim is not infringed by use of less than the entire combination. *Burdett v. Estey*, 16 Blatch. 105; *Sharp v. Tift*, 18 Blatch. 132; *Fuller v. Yentzer*, 94 U. S. 288; *Reedy v. Scott*, 23 Wall. 352.

² 9 Blatch. 65.

³ *Wallace v. Holmes*, 9 Blatch. 74.

Wallace *v.* Holmes were enjoined, notwithstanding that the thing which they manufactured and sold did not in itself embody the invention secured to the complainants. The act was found to be wrongful because of the obvious intent of the defendants to make the burner for use only with another thing which the user was to supply. If this were the only case on the subject of contributory infringement it might perhaps be argued that the *incompleteness* of the burner as made by the defendant offered the key to the rule to be applied; but this can only be regarded as one of several grounds for inferring *intent*, which made the act of manufacture and sale wrongful. The infringement of patent rights is a tort; here there is an instance where the intent of a factor makes an act which in itself is innocent, a tort.

The writer is aware that a vexed question which has been thoroughly discussed in these columns¹ is suggested by the statement of the result of Wallace *v.* Holmes; but it is not the present purpose to attempt a reopening of the question. Wallace *v.* Holmes has been followed and the application of its principle extended in patent cases, so that, whether the case and its successors are regarded as the extension of a sound doctrine or the contrary, it must be conceded that the principle of the case is established in the patent law at least, and that contributory infringement will be treated in the Federal courts with the same remedies as are applicable to cases of direct infringement.

In Wallace *v.* Holmes the specific state of facts might, if the case stood alone, give ground for asserting that the rule there applied went only so far as to hold that the defendant, who was proved to have made a thing useless by itself, might be presumed to be a party to the operative completion of the infringing combination, and that only where such a presumption proved inevitable should there be a suspension of, or rather an exception to, the rule which permits a patentee to control or suppress only full embodiments of his claim. On this theory, however, difficulty would arise for want of parties. The question of joint infringement is distinct from that of contributory infringement, and if the collusive circumstances of joint infringement were regarded as the key to the situation, then in the absence of actual conspiracy between several persons, who by successive individual acts complete the embodiment of infringement, no recovery or relief could

¹ Lumley *v.* Gye, HARVARD LAW REVIEW, ii. 19.

be had as against the individual who made a part of the infringing combination, even if his wrong intent were confessed. The court in *Wallace v. Holmes* alluded to this phase of the situation and disposed of the question of conspiracy by holding that there existed no necessity whatever for joining as defendants the persons who received the burners from the defendant and made them effective by adding the chimney.

The rule in *Wallace v. Holmes* soon met with the approval of the First Circuit, Judge Shepley saying in *Saxe v. Hammond*:¹—

“There can be no doubt as to the soundness of the conclusions of the court in that case, or the cogency of the reasons given by the learned judge in his opinion.”

Presently there arose a case² in which the facts were clearly distinguishable from those in *Wallace v. Holmes* in their specific character, although in the broader view they have something in common. The complainant sued on his patent for a method of supplying towns with water. The condition of things is set forth in the opinion of the court (Wheeler, J.): —

“It has been urged in argument, that the defendants only make and sell the Flanders pump, and that they do not infringe the plaintiff's patents, although their purchasers may have infringed by putting them into systems of water works. If all they did was to make and sell these pumps merely, probably they would not infringe by that alone. But the answers and proofs go beyond this. Flanders, in his testimony as to what works they have put up, does not limit what they did to making and selling the pumps merely. The effect of the whole clearly is that they participated and concurred in putting in the whole, by furnishing the pumps for that purpose; and this is sufficient to make them infringers.”

While *Holly v. Vergennes Co.* is cited usually among the cases of contributory infringement, analysis of the facts set forth in the above statement seems to show that the defendant did more than furnish pumps with knowledge and intent that they should form part of a water-supply system which infringed complainant's patent. The defendant “*participated* and concurred in putting in the whole.” If the patent in suit, though called a patent for a “method,” was really a patent for an apparatus, then the defend-

¹ 1 *Holmes*, 456, 458.

² *Holly v. Vergennes Machine Co.*, 9 Blatch. 327.

ant's act amounted to a manufacture of the apparatus, and was therefore an ordinary infringement. If the patent was strictly for a method or process, and not in terms for an apparatus, participation in the instalment of the apparatus necessary to the performance of the method or process would certainly be a contributory infringement of the patent, if indeed it would not be treated as a case of direct infringement. It is submitted that the proper treatment of such a case would be under the rule of contributory infringement, for the methods or processes which form the subject of patent claims are dissociated from any apparatus of which the function is performed in carrying out the process; one of the best established rules of patent law being that the mere functions of a machine or apparatus cannot properly be claimed as a process.¹

The full meaning of the rule of contributory infringement is stated in *Travers v. Beyer*,² wherein the opinion of the court is inconsistent with a specific limitation of the rule such as might be read into *Wallace v. Holmes* or *Holly v. Vergennes Co.* The court states the case as follows: —

“They [the defendants] are making and putting upon the market an article, which, of necessity, to their knowledge, is to be used for the purpose of infringing the complainant's patent. They therefore concert with those to whom they sell the blocks to invade the complainant's rights. They are intentional promoters of the ultimate act of infringement.”

The question has been asked, and probably has been urged by the defendant in every case of contributory infringement, whether a perilous precedent was not being established which might lead in conceivable instances to an unjust embarrassment of a manufacturer or seller of articles innocent in themselves, which, nevertheless, had become actual instruments of wrong in the hands of others. There is always, nominally at least, a clear remedy for the patentee by suit against the immediate infringers whose acts are punishable by injunction, whether or not any actual intent to infringe existed. In many cases, however, such a remedy is wholly inadequate. A manufacturer who distributes thousands of infringing machines is the only defendant against whom the patentee can obtain real relief; for as against the purchaser and user a suit in equity could not reimburse the patentee for the unavoidable expenses of his suit; the courts recognize the existence of this state

¹ *Locomotive Works v. Medart*, 158 U. S. 68.

² 26 Fed. Rep. 450.

of things, and in cases of contributory infringement assist the patentee, so far as possible and proper, in his attempt to stop the trespass at its origin rather than compel him to take a course which practically opposes an impossibility to his effort toward establishing or enforcing his right.

"Parties should not be permitted to evade the law by such proceedings as these papers disclose; it is the clear duty of the court to arrest the wrong in its inception."¹

The case from which this quotation is taken presents a peculiarly suggestive state of facts. The patent sued on was for a composition of matter, composed of pulverized calcined gypsum, glue, and water, for use as a calcimine. The defendant sold a compound composed of pulverized calcined gypsum and glue, *directing the purchaser* to add the necessary water. The court held that the defendant, in selling a compound which he knew could not be used without involving an infringement of the patent, was himself an infringer, although in terms the compound which he sold did not fall within the patent claim, and cited in support of the rule a number of cases, among them *Wallace v. Holmes*, *Travers v. Beyer*, and *Cotton Tie Co. v. Simmons*.² The last-mentioned case is one of a group³ of strenuously contested cases which present an interesting condition of facts. The complainant made a patented cotton tie buckle and band, and in order to keep its market alive with a continuing demand for new goods, sold the ties and buckles with an express condition that they were to be used once only, the ease with which old buckles and bands could be remade and used repeatedly being obvious. The case which brings the doctrine of contributory infringement into boldest relief is the *McCready* case, where the defendant, a shipowner and carrier, was in the habit of conveying quantities of dismantled cotton ties and buckles to Southern planters whose notorious intentions were to use the patented articles after the first and only licensed use was past. Doubtless recognizing the futility of seeking its remedy against the users themselves, who were widely scattered and in most cases obscure and unknown, the patentee brought its bill against the carrier, praying that the shipment of these instruments of trespass be en-

¹ *Alabastine Co. v. Payne*, 27 Fed. Rep. 559.

² 106 U. S. 89, 94, 95.

³ *Cotton Tie Co. v. Simmons*, 3 Ban. & Ard. 320; *Same v. Same*, 108 U. S. 89; *Same v. Bullard*, 4 Ban. & Ard. 520; *Same v. McCready*, 4 Ban. & Ard. 588.

joined. The defendant urged that the injunction prayed for would work serious hardship in depriving him of the benefits of his lawful business, and that the mere carriage of the goods in question constituted no invasion of the patentee's privileges, being neither manufacture, sale, nor use. Judge Blatchford disposed of these contentions, saying in effect that the defendant would be deprived by injunction of no business which he would not lose if all the immediate infringers, the users or intended users, of the ties and buckles, were disciplined by the injunctions which would issue against them, were they known and duly prosecuted. The fact that it was wholly impossible to use the old ties and buckles except as instruments of infringement seems to have been a determining factor, the court perhaps assuming judicially that the shipment of broken cotton ties as old junk involved a commercially impossible transaction.

However unusual the circumstances of the McCready case may seem, it is believed that the rule there applied affords a test for governing all cases of contributory infringement: a test to be used as a supplement to the test of *intent*, if indeed it is not coterminous therewith. Will the injunction asked for deprive the defendant of any business which he would enjoy in case all the persons who wrongfully use the things sold were enjoined against continuance of the immediate infringement? If the only possible use of the articles made and sold involves an infringement of patent right, then the wrongful intent of the vendor follows as a matter of course; but if, on the other hand, there exist rightful uses of the things sold, the specific intent in special instances must be traced and proved so that the issue of injunction may be guarded by proper conditions and terms. The rule is the same in either case, requiring an application in varying measure to suit conditions.

Cases which illustrate the working of the rule are not wanting. In *Millner v. Schofield*,¹ the owner of a patent for a tobacco-curing apparatus, which involved in its structure sundry elbows and flues of sheet iron for the conveyance and distribution of hot air, brought his bill in equity against a manufacturer of sheet-iron ware, seeking to have him enjoined against making and selling flues and elbows, alleging that these articles were used by others in installing and completing tobacco-drying apparatus which infringed the patent. No proof of actual concert with the imme-

¹ 4 Hughes, 258.

diate infringers was satisfactorily established, and the court held that as there were miscellaneous innocent uses for such things as sheet-metal flues and elbows, and as no specific instances were proved which brought any charge of wrongful intent to the defendant's door, no injunction could issue which would not in its operation embarrass the defendant in the pursuit of his lawful business. *Wallace v. Holmes*, *supra*, was cited with approval, and clearly distinguished.

If the proofs in *Alabastine Co. v. Payne*, *supra*, had established merely the facts that the defendant sold calcined gypsum and likewise glue, these things being recognized articles of general commerce, in all probability no injunction would have issued. But the defendant had made the case clear, first by making a mixture of calcined gypsum and glue (an unusual compound, probably), and second by selling it with directions for use with a proper amount of water. The injunction could, under the rule applied, quite properly suppress acts of such well-defined purpose.

In a later case Judge Coxe, who decided the *Alabastine* case, made the proper distinction clear. The defendant sold metallic button fasteners to all persons who desired to purchase, and to some extent to jobbers and distributors of such articles. These fasteners were adapted for use in button-fastening machines which had previously been declared to be infringements of the complainant's patent. Many of them, however, still remained at large in the hands of users who had bought them from the infringing manufacturer. The use of these machines, by whomsoever held, was conceded to be an infringement of the patent. But the manufacturer of these machines had also at a prior date made and sold a number of button-setting machines which did not embody infringements of the patent in suit, and these machines also were capable of using the troublesome button fasteners, which in themselves were innocent articles of manufacture, resembling nothing so much as very diminutive hairpins. Here there was a case where the defendant, selling without questioning his customer, argued well that so far as he was concerned the ultimate use of the fasteners might or might not be innocent, and that he was not under the disagreeable duty of making inquiry. But, as the complainant had proved that the defendant, who was one of the former manufacturers of the infringing machines, jealously kept possession of all the books wherein the names and addresses of the users of those machines were listed, and as it was

proved also that the bulk of defendant's fasteners must be consumed by those machines, or not be used at all, and that the defendant sold goods to these users through the mails, the court ordered an injunction to issue forbidding the defendant to sell to these users, directly or indirectly, conferring on the complainant the unhappy duty of furnishing a list of the users.¹

This disposition of the case accords precisely with the ruling of the court in *Willis v. McCullen*,² where the defendant had license from the complainant patentee to use a patented process, and to sell materials for that process to persons who, like him, had license to use it. The defendant sold these materials, which were not patented, to unlicensed persons for use in the patented process, "knowing that the materials were purchased for this use, and intended that they should be so applied." The court found that "by these sales thus made, the respondent became a party to their use;" and in consequence held that "a decree must be entered against him *as respects such sales for use in the process to unlicensed persons.*"

The italicized portion of the above quotation indicates clearly the qualification which was to save the decree from the objection that it might interfere with the defendant in the prosecution of his lawful business.

In *Schneider v. Pountney* ³ the defendant was sued for infringement of a patent for a lamp-shade having a shade-holder of transparent material, and other specific mechanical features, the whole enabling an oil-lamp to be used without the ordinary chimney.

The charge against the defendant was:

... "that he has manufactured and sold the transparent glass shade-holder which is one of the constituents of the complainant's combination, and the only one that is claimed to be novel and that characterizes Votti's invention. As there is nothing in the reissue which claims this shade-holder, except in combination with the other elements, it is clear that the making and selling of it, standing alone, is not an infringement of any of the claims. See *Saxe v. Hammond*, 1 Ban. & Ard. 632."

The complainant proved satisfactorily that there were "no other uses to which the shade-holder, made by the defendant and complained of by the complainant, can be applied, except in combination with the other devices of the Votti patent."

¹ *Heaton Button Fastener Co. v. MacDonald et al.*, C. C. U. S. No. Dist. of N. Y (not reported).

² 29 Fed. Rep. 641.

³ 21 Fed. Rep. 399.

"This testimony stands uncontradicted, except by the suggestion of defendant's counsel of possible uses to which such shade-holders might be applied."

Wallace *v.* Holmes was followed, and was quoted at some length with unqualified approval.

Many cases under the rule of contributory infringement have been decided by the Federal courts, and are in harmony with those herein discussed. In one case the facts raised the discussion of the rule in all its shades of application; but, after all the questions arising from a quite complex situation had been sifted and disposed of, the case called for the unqualified application of the rule. This was Heaton Peninsular Button Fastener Company *v.* Eureka Specialty Company,¹ contested on bill and demurrer. Later cases are Thomson-Houston Electric Co. *v.* H. W. Johns Co.;² Thomson-Houston Electric Co. *v.* Ohio Brass Co.³

The formulation of a rule is not a task which the writer undertakes with confidence; it is submitted, however, that the rule to be deduced from the cases under discussion is not too broadly stated thus: —

Any act done with intent to contribute to an infringement of patent-rights is wrongful, tantamount to a direct infringement, and will be enjoined by a court of equity, although in itself, and considered apart from its intended purpose, such an act might be lawful.

In its enforcement, this rule will be guarded by such terms of application as will prevent it from embarrassing the person enjoined in the performance of the acts in question when properly dissociated from any wrongful intent.

Odin B. Roberts.

¹ 47 U. S. App. 146.

² 78 Fed. Rep. 364.

³ 80 Fed. Rep. 712.

JOINDER OF CLAIMS UNDER ALTERNATE AMBIGUITIES.

AMBIGUOUS gifts in wills are treated with very scant courtesy by the English courts. Unless the ambiguity can be removed by extrinsic evidence, the gift fails to take effect; the principle being that an unambiguous disposition is necessary to defend the title of the heir at law, next of kin, residuary devisee or legatee, or person entitled in default of appointment. There are many cases, however, in which the ambiguity is very limited in extent. It may be twofold, threefold, or manifold, but it is quite clear that the testator meant one of a definite number of persons, things, or events. At first sight it would seem that if it were possible to join the claims under these ambiguities, an unanswerable dilemma, trilemma, or polylemma would be presented to the court. It is, therefore, necessary to inquire on what principle the court acts in refusing to allow such a joinder. Such dilemmas are treated with the same severity as the ox too wont to push with his horn in the days of Moses. Why is this?

The lawyer's answer is quite ready. An ambiguity is a mere zero or cipher, *i. e.* nothing at all; and no number of ciphers can amount to the unity which represents a complete gift. This answer, if accepted, completely disposes of the question. But might not a layman of average intelligence, coming fresh from Lord Esher's Farewell to the Forum, deeply imbued with the idea that law is after all the quintessence of common sense and logic combined, put the case in some such way as this? "An ambiguity is not necessarily a cipher. It is either a cipher or unity; and in that ambiguous condition it is no doubt ineffectual as against the heir or next of kin. But the sum of all possible ambiguities amounts to unity; and if they are all represented by claimants who are *sui juris* and can join their claims, why should not effect be given to the unity thus obtained? In that way the testator's intention would be far more nearly carried out than by the present practice, which is really illogical. Suppose there are three possible ambiguities, *x*, *y*, *z*, which are mutually exclusive.

Then the value of each is 'o' or '1,' and the true logical equations are as follows: —

$$x + y + z = 1 \quad (1)$$

$$xy = 0 \quad (2)$$

$$yz = 0 \quad (3)$$

$$zx = 0 \quad (4)$$

The lawyer practically refuses to acknowledge equation (1). If he writes anything, it is

$$x + y + z = 0,$$

urging that as x , y , and z must each be deemed to be zero, unless they are proved to be unity, therefore

$$x + y + z = 0."$$

To such a layman the lawyer's answer might indeed seem good law, but hopeless logic. This is a Law Review, but it may nevertheless prove not uninteresting to examine one or two typical cases from this Philistine standpoint.

Take, for instance, the case of the ambiguous devise or legatee. A testator gives his residue to "my nephew Jones." He has two and only two nephews named Jones, viz., Richard Jones and William Jones, both *sui juris*, and it is quite certain that he meant one of them; but, no evidence being forthcoming, it is impossible to ascertain which. Would it not be reasonable to allow Richard and William to join their claims and divide the property as they wished? It is not quite clear whether any such joinder was attempted in *Stephenson, In re, Donaldson v. Bamber*.¹ Probably the law that an ambiguity counts as zero was too well accepted, but it certainly defeated the testator's intention *in toto*, whereas a joinder of the claims would have defeated it only *pro tanto*. Even if some of the claimants were infants, the court might well sanction a compromise joining their claims, rather than let the whole property go to the heir, next of kin, or other persons whom the testator clearly intended to dispossess. To this small extent a leaning against intestacy would surely be permissible.

Next take the case of the ambiguous devise or legacy. A testator seised of four freehold houses in Sudely Place leaves No. — Sudely Place to A, No. — Sudely Place to B, No. — Sudely Place to C, and No. — Sudely Place to D, the numbers of the houses being omitted. It will be noticed that the testator has not given "a

¹ 66 L. J. Ch. 93; [1897] 1 Ch. 75.

house," but "a specific house" in each case, so that selection by the devisees is out of the question. The testator has himself made the selection. What has he selected? The lawyer answers, "Nothing;" and the four houses, unfortunately unnumbered at the date of the will, will go to the heir at law, however friendly and eager to pool their claims A, B, C, and D may be.

In *Asten v. Asten*,¹ one of the devisees was the heir at law, and he of course claimed all the houses. The claims of the other devisees would not have amounted to unity, if joined, so no attempt was made to join them. But it is fairly certain, as the law stands, that if the heir at law had been a different person altogether, the four devisees could not have combined against him. And yet those four devisees would have represented every one of the twenty-four possible allocations of the four houses. The curious thing is that claimants entitled under the various possible constructions of a will are entitled to join their claims and ask for a declaration of intestacy as against the heir or next of kin, without troubling the court to construe the will as between themselves in the first instance. That may be left for a future occasion, when the claimants under an intestacy are out of the way. This course is allowed because it is perhaps somewhat too hastily assumed that the court could construe the will if it tried. For instance, in *Forester, In re, Jervis v. Forester*,² a testatrix left her residue for such charitable purposes as she should by codicil appoint, and by codicil directed that it should be paid to The Forester Charity Trustees, to be applied for the purposes of a cottage hospital and a convalescent home, the sites to cost £2,000 and £5,000, and the building and furnishing £10,000 and £30,000 respectively. The residue, being about half a million, was largely in excess of the most extravagant requirements of a hospital and home built on such a small scale. The Forester Trustees and the Attorney-General joined forces against the next of kin, and successfully contended that there was a general dedication to charity, and no intestacy, as indeed was tolerably obvious. The actual destination of the surplus funds is still *sub judice*, and no doubt capable of decision if necessary; but it was a distinct advantage to get rid of the next of kin at as early a stage as possible. A case in which the court has said that on a careful consideration of the

¹ 63 L. J. Ch. 838; [1894] 3 Ch. 260.

² 13 Times Law Reports, 555.

whole will, and after referring to the usual bead-roll of more or less relevant authorities, it is unable to decide in favor of either of two equally balanced constructions, has yet to be reported. It is almost certain that no such case can have occurred during the seventy-five years' life of the Law Journal Reports without express attention being drawn to it. So, again, no doubt the triplets Fortunatus, Stephanus, and Achaicus, referred to in Stephen on Evidence, article 31, might have joined in an ejectment as heir at law of their father if their relatives had been less careful to distinguish which was the eldest. The law would have allowed that course, because clearly the legal estate would have been actually vested in one of them. But apparently a devise to the father's heir at law would have been ineffectual apart from the armstring, declaration, and reference to 1 Cor. xvi. 17.

Another group of cases may be called "the ambiguous event." Property is given in one event to A and in another event to B. One of the events must have happened, but it is impossible to ascertain which. In former days A and B could not have clubbed their rights together and said that one or other of them was entitled; and if they had both conveyed their rights to a third person he would probably have been no better off. In *Wing v. Angrave* (1860),¹ a wife executed a general testamentary power of appointment over certain property in favor of her husband, and in the event of his death in her lifetime to Wing absolutely. On the other hand, the husband bequeathed his property in trust for his wife absolutely, and in the event of her death in his lifetime upon trust for Wing absolutely. Both the appointment and bequest were subject to trusts for children, which failed. The husband and wife went down in the same ship, and the question arose, who was entitled to the property appointed by the wife. It was admitted that if Wing had been entitled to that property for his own use absolutely in either event, he might have taken it. If, for instance, the appointment had been in one event to Wing, in the other to the person who was Lord Mayor of London at the death of the appointer, then if Wing had happened to be Lord Mayor at that time he would have been entitled *quâcunque viâ*, and his title would have been good. In that case it would have been certain that in every possible event Wing was entitled for his own use and benefit. But in the actual case Wing claimed

¹ 30 L. J. Ch. 65; 8 H. L. C. 183.

the property either as appointee of the wife if she survived, or as executor and residuary legatee of the husband if he survived, subject to paying his debts; and these two distinct and inconsistent rights were held incapable of joinder. To a layman, again, it would seem so natural for Wing to have offered to take the half loaf and pay the husband's debts and legacies in either event out of the property. But in 1860 he was not allowed to do so. His two claims could no more be joined in those days than if they had been vested in separate persons. Such a joinder was then considered champertous, contrary to policy, and obnoxious to the statute against buying or selling pretended titles.¹

At the present day the rules of court allow both the joinder of plaintiffs and the joinder of alternative causes of action, so that the difficulty of the ambiguous event might perhaps be got over. But the ambiguous devisee or legatee and the ambiguous devise or legacy are still in a parlous state, and, it may be, receive at times somewhat less than natural justice. The examination student who regards the heir at law with a veneration little short of feudal would probably not waste much sympathy upon such unsubstantialities. Hawkins, Jarman, and Theobald supply ready and convenient answers to all such questions; and lay criticism is not likely to commend itself to a legal examiner. But the happier student, who has laid aside his straight-waistcoat, and can think a little for himself, might not unprofitably spend an hour or so in satisfactorily exposing the sophistries of that quibbling layman, and relegating him and his mare's-nest to their normal obscurity.

G. Rowland Alston.

¹ 32 Henry VIII., c. 9. *Vide* Cholmondeley v. Clinton, 2 J. & W. 1, 136; Tur. & R. 107, 116; 4 Bligh, 1, 43, 81, 90, 123.

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THE NEBRASKA MAXIMUM FREIGHT RATES.—Of the questions that complicate the modern economic system none is more difficult than that of the regulation of rates charged by quasi-public corporations, and, in particular, by railroads. It would seem to have been of primary importance that the extent of the power of the State legislature under the federal Constitution to regulate the rates charged by railroads within its limits should be settled by the United States Supreme Court; but this has not been finally accomplished until the recent case of *Ames v. Union Pacific R. R. Co.*, reported in the *Chicago Legal News*, March 19, 1898. A Nebraska statute prescribed a schedule of maximum rates, which rates, if adopted by the railroad company, would have forced the railroad to operate at a loss, so far as profits within the State were concerned. This statute the court held unconstitutional, on the ground that it worked a deprivation of property without due process of law.

The decision of the court, by Mr. Justice Harlan, although it has been severely criticised, seems to be sound. It is consistent with a line of dicta in analogous cases, which have themselves been distinguished upon dubious grounds, *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. Rep. 362; and the conclusion also follows necessarily from the decision in the case of *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578. In the latter case a statute was held invalid which prescribed such rates for the tolls to be charged by turnpikes that the plaintiff, a turnpike company, would have been deprived of all profits. From turnpikes to railroads the step is short. The principles which apply are the same; and it is noteworthy that the turnpike case was decided largely on the authority of the dicta in the previous railroad cases. The argument of those who disagree with the position taken by the Court has been that any State statute properly enacted is "due process of law" within the meaning of the Constitution, and that, if it is necessary that a regulation should be reasonable in order to fall within the limits of the police power of the State, the question is nevertheless a legislative

one, and the action of the State legislature in regard to it is conclusive. This position, however, is slightly inaccurate. In order that a State law may be a valid exercise of the police power, it must be reasonable; and the decision whether it is reasonable or not is in some cases within the province of the federal courts. The question, it is true, is not one of law; but it is a question arising under the Constitution of the United States when the statute causes a deprivation of property, and the courts cannot escape the responsibility of deciding it. In dealing with the matter, the court is in a position similar to that of an appellate court passing upon the facts found by the jury at a trial in the court below; and presumably it can properly hold a State statute invalid only when under no possibility could the statute be considered a reasonable police regulation. *Steenerson v. Great Northern Ry. Co.*, 72 N. W. Rep. 713 (Minn.). The Supreme Court of the United States has never explicitly stated this rule, but it seems to have followed it tacitly in all the cases hitherto decided. The principal case, at all events, falls within the rule. The Nebraska statute had no ulterior object beyond the express object of securing fair rates, which must, of course, be fair to the railroads as well as to the public; and since the statute if enforced would have been confiscatory, or practically so, no one could suppose, under the circumstances, that it was a reasonable regulation.

The effects of the decision are as yet problematical. So far as the public and the States are concerned, it can work little hardship. Although legislatures may chafe under the limitation, the public can have no just cause for complaint if railroads are allowed to make reasonable profits. The chief hardship must fall upon the federal courts in being forced to decide questions which are by nature legislative. This evil, however, may not be so great as at first sight appears; for if courts adhere to the rule of holding no statute invalid which is not hopelessly unreasonable, they will offer little encouragement for bringing cases of this class before them. There may be difficulty if parties accept the suggestion of Mr. Justice Brewer in the Circuit Court, and bring suits continually upon statutes once declared unconstitutional, in the hope that conditions may have changed since the last decision; but in practice it is hardly likely that States will leave unrepealed and unaltered upon the books statutes that have been declared invalid, upon the chance that under changed conditions they may again be brought to life. The great merit of the decision is in affirming to railroads their constitutional safeguard against legislative attacks; the question which is still left for the court to face is how far it will pass upon the reasonableness of rates imposed by a State when the rates merely limit, without virtually destroying, the profits of the corporation.

COMMON-LAW COPYRIGHT.—The literary property of a writer in his work is probably supposed by most people to be no sort of legal property at all, apart from the effect of copyright statutes. The right of an author, however, to the exclusive use of a particular form of words originated by him has been treated by the courts for a hundred and fifty years, and probably much longer, as a permanent right of property, quite distinct from the ownership of the manuscript as a physical object. In the cele-

brated case of *Millar v. Taylor*, 4 Burr. 2303, it was decided that at least after the statute 8 Anne, c. 19, which gave the author a copyright for a limited term of years, the effect of publication was to deprive him of this common-law copyright. The doctrine of this case has always been received with favor in America. The question as to what constitutes publication, however, still remains unsettled in many respects, as is shown by a recent case in the New York Court of Appeals. *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.* (reported in the New York Law Journal, March 16). In this case the plaintiffs collected information concerning the jewelry trade, and printed it in books, which they distributed by lending them to all those who chose to subscribe for them under certain conditions. These conditions were that the subscriber should only have the use of the book for one year, should return it to the plaintiff at the end of that period, and should keep all information contained in it confidential. The defendants subscribed for the book and then published a part of its contents. The plaintiffs thereupon seek an injunction against such a publication as an infringement of their common-law copyright.

The plaintiffs had taken steps to secure a copyright under the United States statute, and had already deposited two copies, as required by law, in the office of the Librarian of Congress. Three out of seven judges consider that this deposit amounted to a publication of the book, whether or not the copyright under the statute was finally secured. As the deposit of the copies in the library made their contents accessible to the public, free at least from any control by the author, this view seems correct, and is a sufficient ground for the decision of the case in favor of the defendant. The result is reached by the majority of the court, however, by a different course of reasoning. They say that the distribution of copies of this book, whether by way of sale or loan, without any limit except the willingness of the public to subscribe for it under the terms offered, amounted in substance to a publication; and to recognize the common-law right of property as still existing offers an easy means by which the owners of a book may enjoy the profits of publication without giving up their perpetual exclusive rights in the work. It would seem, nevertheless, that the distribution in this case, however extensive it may have been, differed essentially from publication by putting on sale; the book was never intended to circulate at all; it was to be used only by those who took it directly from the proprietor and under his control. And if the owner of a piece of literary property can by any such scheme make a profit out of it, without clearly giving up his common-law copyright, there seems to be little reason for preventing him from doing so. It is hard enough for an author, in ordinary case of publication, to be compelled to exchange his perpetual unlimited right for a limited statutory right before he can make use of almost his only means of getting any advantage from the result of his labor.

SUBSTANTIVE LAW UNDER THE GUISE OF EVIDENCE.—The ordinary party to an action, if he feels that justice has been done, especially if it inclines to his side, generally accepts the final decision as being the sole matter of interest to him. It is not so with the judicial mind, to which the correctness of the result is of no greater interest than the principles on which that result rests. A decision recently handed down by the United States Supreme Court in the case of *Richmond & Alleghany R. R.*

v. *R. A. Patterson Tobacco Co.* (18 Sup. Ct. Rep. 335) is interesting from both these points of view. A statute of Virginia declares that a carrier who accepts goods for transportation to a point beyond his own route is responsible for them as a common carrier, unless he shall have contracted in writing that beyond the terminus of his own line he is to be responsible only as a forwarding agent. The court holds that such a statute merely lays down a rule of evidence, and does not so infringe the right of the carrier to limit his liability by contract as to amount to a regulation of interstate commerce.

The substantial justice of this class of decisions has been recently touched upon. See 11 HARVARD LAW REVIEW, 544. Turning, however, to the other aspect of the question, can it be said as a matter of principle that the true *ratio decidendi* is that which is intimated by the court? It is true that it is commonly said of the clauses in the Statute of Frauds and similar statutes that the requirements laid down by them are those of the law of evidence. It may, perhaps, be questioned whether this is not "obscuring the difference between substance and form;" and whether it would not possibly be more correct on principle to say that these are simply cases of substantive law, couched sometimes, for the sake of convenience, in terms of evidence. To draw an illustration from another field of law, it could hardly be maintained that the requirement of a seal for a covenant or of witnesses for a will belongs to the law of evidence. The requirement is simply a rule of substantive law that a document without a seal is not a covenant, or without witnesses is not a will. It is readily conceivable that there might be an abundance of probative matter by which the agreement of the parties in the one case, or the desires of the deceased in the other, could be established beyond cavil. The proof might be wholly unobjectionable on any of the laws of evidence; and yet all this endeavor would be in vain, not because of any law of evidence, but because the law in regard to instruments makes it necessary that a deed should have a seal and a will witnesses, and these documents do not fulfil the requirements. Similarly in the present case; the real difficulty that the appellant encountered was not that he could not establish what had been agreed upon, but that because of the substantive law of Virginia in regard to carriers the agreement would not do him any good when he had established it; his trouble is "that he is trying to do something which is legally inadmissible, not that he is trying to do a permissible thing by means of evidence which is objectionable."

RESTRAINTS ON ALIENATION BY MARRIED WOMEN. — The recent case of *Brown v. McGill*, 39 Atl. Rep. 613, in the Court of Appeals of Maryland, affords an excellent test of the principle upon which the law allows restraints on the alienation of a married woman's separate estate. A *feme sole* in contemplation of marriage settled her own property upon a trustee in trust for herself for life, for her separate use, without power of anticipation. The court decided that this restraint upon alienation was ineffective, it being against public policy to allow a woman thus to place her own property beyond the reach of those who should subsequently become her creditors. Even when, as in Maryland, spendthrift trusts are tolerated, it is well settled that they will not be allowed where the

cestui is himself the settlor. Whether this rule should be relaxed in favor of a married woman was the question before the court.

At one time, before any statutory alterations in the law of married women, the difficulty experienced in some jurisdictions was not in limiting the power of the wife to charge or to alien her separate estate, but in removing, in reference to such estate, her common-law incapacity to bind herself by contract. *Price v. Bigham*, 7 Har. & J. 296, 317. The husband's control was expressly excluded by the terms of the settlement; the wife was regarded as possessing no will of her own. Consequently, effect was readily given to the clause against anticipation. If such restraints are to be thus explained as a common-law disability of coverture which equity has not removed, it may well be urged, now that most of such incapacities have been abolished by statute, that the restraint on alienation should be enforced only when it would be effective if the *cestui que trust* were unmarried. Judged by this criterion, the clause prohibiting alienation, in the principal case, would as above stated be clearly inoperative. By this line of reasoning, it may, perhaps, be possible to support the decision, as well as similar adjudications in Massachusetts and Pennsylvania. *Jackson v. Van Zedlitz*, 136 Mass. 342. In those States, apparently no distinction is taken between married women and persons *sui juris*, so far as the validity of limitations on the power of alienation is concerned.

If this view were adopted in jurisdictions in which spendthrift trusts have obtained no foothold, the clause against anticipation, even a settlement to the separate use of a married woman, would, of course, always be held invalid. This result has been avoided, and such restraints enforced, on the ground that they are necessary to prevent the husband from obtaining the benefit of his wife's property by means of undue influence. The historical development of the subject in England gave support to this theory. The doctrine of the separate use was established in that country long before the prohibition of anticipation was introduced by Lord Thurlow. Consequently, that restriction was looked upon as a further "violation of the laws of property," which could be justified only as necessary to protect the *cestui* from the threats or persuasion of her husband. *Tullett v. Armstrong*, 4 Myl. & C. 377, 405. This danger being equally great where the wife is herself a settlor, the question of the principal case has, without hesitation, been decided in favor of the restraint. *Clive v. Carew*, 1 Johns. & H. 199, 205.

This English rule which allows a woman in contemplation of marriage to place her property in perfect security from the cupidity of her husband and from her own generosity, is more consonant with the spirit of our equity jurisprudence. It is remarkable that this protection which is granted in England, where restraints on alienation are viewed with hostility, should be refused by those courts in this country which regard spendthrift trusts without disfavor. The result is an instance of the confusion which departs from settled principles of law usually occasion.

IMPLIED RESERVATION OF EASEMENTS. — When a land-owner sells a portion of his estate by absolute conveyance, if no access remains to the part retained except through the part sold, all jurisdictions hold that a way is reserved or regranted by implication. This rule is based on the

necessities of the case and the impolicy of reducing any land to a state of absolute uselessness. The English courts go little, if any, beyond this point. The law in England was settled by the case of *Suffield v. Brown*, 4 De G., J. & S. 185, that easements are impliedly reserved only where the property cannot be enjoyed without such reservation. The Supreme Court of Maine, where this rule has been followed, recently has had to apply it to an unusual state of facts before them in *Hildreth v. Googins*, 39 Atl. Rep. 550. The owner of a lot, bounded on one side by a highway and on the other by the ocean, sold that half of the estate which adjoined the highway without expressly reserving a way across it from the highway to the part he retained. No access could be had to the unsold portion except by the ocean or by crossing land of other owners. The Court said that implied reservations were not to be favored except in cases of strict necessity, that the ocean was a public highway, and as all communication was not shown to be cut off, the grantor must in future rely on such access as the sea afforded. This decision is within the letter of the rule. But the difficulties which a farmer would have to surmount in utilizing this road would generally prevent any but the most primitive use of the land; and it seems that the court might well have refused to consider the sea as a way in the sense that a way is necessary to the farmer.

The English doctrine strictly enforced appears often to reach harsh results; and many American courts have recognized the need of a more flexible rule. The Supreme Court of Maryland in *Burns et al. v. Gallagher et al.*, 62 Md. 462, laid down a test that has much to commend it; namely, that the principles of implied reservation may be invoked when the necessity is so strict that it would be unreasonable to suppose the parties intended the easement in question should not be used. This test, which would satisfactorily dispose of the case under discussion, is easy of application, fair to both parties, and well suited to the needs of this country.

CITIZENSHIP OF CHILDREN OF ALIEN PARENTS.—The final word upon this phase of our law of citizenship seems to be said in the case of *United States v. Wong Kin Ark*, now in advance sheets. The Supreme Court of the United States, speaking by Mr. Justice Gray, held that one born of Chinese parents domiciled in California was a citizen, and could not be excluded from the United States, although he had twice returned to China. The Chief Justice and Mr. Justice Harlan entered a vigorous dissent. The case is of first impression in the Supreme Court; although the same opinion has been previously intimated. The decision follows a series of well-considered adjudications in the Circuit Court, where the law has long been regarded as settled by Mr. Justice Field in the case of *In re Look Ting Sing*, 21 Fed. Rep. 905. The dictum to the contrary of Mr. Justice Miller in the *Slaughter House Cases*, 16 Wall. 73, must now be regarded as definitively overruled.

Citizenship is a question not of international but of municipal law. The division of the law of citizenship into the *jus sanguinis* and the *jus soli* is a deduction from the division of the jurisdiction of a State into the personal and the territorial. In the civil law, citizenship is by descent. At common law, all those born within the kingdom or allegiance of the crown were held subjects; and if the United States have a common law

this ancient rule governs. *Calvin's Case*, 7 Rep. 1. Whatever abstract rules there may be, the right of every sovereignty to determine for itself by its own laws who are its citizens is a fundamental one. By the Fourteenth Amendment of the United States Constitution "all persons born or naturalized within the United States are citizens;" the exception is that those not born "subject to jurisdiction thereof" are not citizens. Are the children of aliens within the exception? When within our territory, the sovereigns, diplomats, sailors upon ships of war, and soldiers in the organized military forces of a foreign State, are not subject to our jurisdiction. Children born of parents under these circumstances of extra-territoriality would not be citizens. The same is true of the children of tribal Indians. The logic of these exceptions of sovereignty, however, does not apply to the alien subject domiciled in the United States. He is subject to the territorial jurisdiction; his children are born subject to our jurisdiction; and these, by our municipal law, are citizens. Accordingly, the decision reached by the Supreme Court seems to have every sanction of authority, policy, and theory.

The case further presents a phase of the conflict of laws not often considered. The objection to the doctrine of the majority opinion has been taken by very high authorities, that as our law provides no right of election by or for a child, as do the continental codes, a dual allegiance will result, and this is urged to be contrary to the theory of citizenship. This difficulty, however, is apparent rather than real. When a child is born in America of Chinese parents, China claims him by the *jus sanguinis*, America by the *jus soli*. It is not a question whether he is an American or a Chinaman; he is both. The municipal laws being thus in conflict, his citizenship at any time will depend upon whether he is subject to the jurisdiction of the one or of the other country. The duality of citizenship is a fact only in a third country. In China he is a Chinaman; in America, an American.

ESTOPPEL IN CRIMINAL LAW. — Whether the doctrine of estoppel has any place in criminal law, and if so, what principles govern its application, are questions that have seldom, till of late years, come up for legal discussion. The doctrine has been applied in some jurisdictions in cases of embezzlement under statute, and the decisions have been founded principally on the grounds put forward in Bishop on Criminal Law, Vol. II. ch. 16, § 364. (See, for example, *State v. Spaulding*, 24 Kan. 1.) Relying on such eminent authority, a dissenting judge in a recent Nebraska case maintained that the defendant should be estopped to set up a defence to the crime imputed to him. *Moore v. State*, 74 N. W. Rep. 319 (Neb.). The defendant, who was auditor of public accounts in the State, was indicted for embezzling some of the State's funds. The statute under which he was indicted enacted that if any person charged with the collection, safe-keeping, or disbursement of the public money convert any part of it to his own use, he shall be deemed guilty of embezzlement. By the constitution of the State all fees which were theretofore payable to a public officer for his services were made payable in advance into the State treasury. The defendant, pretending that he was charged with the collection of fees for the State, had received such fees from insurance companies, and had not accounted for them. The majority of the court held

that the defendant was not charged with the receipt or safe-keeping of the fees, but was rather expressly forbidden by the constitution to receive them, and therefore was not within the description of the statute. Sullivan, J., dissenting, contended that as in a civil action by the State the defendant would be estopped to deny that the money belonged to the State, he would be estopped in like manner in a criminal action.

It is difficult to see how, in a civil action by the State to recover the money, there could be any application of the doctrine of estoppel. In collecting the fees the auditor was not the State's agent; he only assumed to act as such. At the time of the conversion, then, the money was not the property of the State, and the latter could lay claim to it only by ratifying the collection by the defendant. The civil action itself could be said to be such ratification, and the defendant could not then deny, or, to speak very loosely, would be estopped to deny, that the money belonged to the State. But this is a principle of ratification; there is no ground for estoppel in any true sense of the word. How can the defendant be said to have made a representation to the State which the State acted upon? And so in the present criminal action; there was no embezzlement of the State's funds, because at the time of the conversion the money was not the property of the State. It might become the property of the State by ratification, but the conversion could not be made a crime by the ratification. To resort to any doctrine of estoppel whose essential elements seem to be absent would overturn all sound principles of statutory construction, and introduce a fiction dangerous to the criminal law.

LIBEL PER SE. — What manner of publication will constitute an injury without more damage is always a difficult question for the court. The general rules are clear and unquestioned, but their application to the particular case must depend upon personal opinion and judicial policy. For this reason the decisions are often open to public criticism. A late instance is the case of *Gates v. N. Y. Recorder Co.* (New York Law Journal, March 10, 1898), in the present term of the New York Court of Appeals. The defendant company falsely published of the plaintiff, who had been lately married to a General Gates, "The General's bride is a dashing blonde, said to have been a concert-hall singer and dancer at Coney Island." In the argument great stress was laid upon the notoriously disreputable character of the concert halls at Coney Island. The court held the publication libellous *per se*. Mr. Justice O'Brien and the Chief Justice dissented.

The right to reputation is not simple, but highly complex and technical. The action based upon this right, developed in the ecclesiastical courts, took the form at common law of an action on the case, which requires an allegation of damage. Certain publications are, as the books say, a general damage by presumption of law; in modern ideas, this means that the imputations are *per se* an injury without damage. In slander, words which impute to the plaintiff the commission of a crime, a loathsome disease, or which disparage him in his office, trade, or profession, are by early judicial legislation actionable *per se*. The liability in libel is broader; vilification, or whatever reasonably brings a man into hatred, ridicule, or contempt, is libellous *per se*. For false publications not defamatory *per se* an action on the case always lies if damage is shown.

The question in the principal case is a nice one ; but it seems that the dissent is the better law. Does the charge "former variety actress" necessarily bring the plaintiff into hatred, ridicule, or contempt? Is damage so conclusively a result that the court can say as a matter of law that the imputation is of itself an injury? It is difficult to reconcile the holding of the majority with *Hemmens v. Nelson*, 138 N. Y. 518, where the publication "she entertained gentlemen company at all hours of the night" was held not actionable *per se*. The New York court might well have said in the present case that special damage was necessary, for the step taken in holding this charge libellous *per se* is one that a court can ill afford to take. It may tend to open the way to the frivolous libel suits to-day so serious a problem in England. The court cannot take notice of the various and ever-changing codes by which social position is gained and lost. The action is a protection of character, not of conceit.

CURIOSITIES OF REPORTING. — These citations, received from a Boston lawyer, show the prevailing errors, and the need of reform, in our present reporting system: —

"The following head-note appears in *Stone v. United States*, 167 U. S. 178: —

" 'The ruling of the court about the challenges are without merit.' "

"From an examination of the case we infer that the reporter meant to say: 'The *objection* to the ruling of the court about challenges *is* without merit.' But when these verbal infelicities are corrected, the head-note still fails to show what the ruling was, except that it was 'about challenges.' The mystery is intensified when we find the note repeated in the index under the title 'Evidence.' "

"The following head-note has a fine Hibernian flavor: —

" 'A consignee of goods sent C. O. D. cannot maintain replevin against the carrier before payment and *delivery*.' *Lane v. Chadwick*, 146 Mass. 68.

"The implication is that if a man would bring replevin he must first get possession of his goods."

GREAT AMERICAN JUDGES. — UNITED STATES SUPREME COURT. — John Marshall was a tall, gaunt man with black hair, whose piercing black eyes seemed almost at variance with the expression of his face, brimful of simple and trusting kindness which touched the hearts even of political enemies. Chief Justice Marshall is believed by many to have been the greatest man who has sat upon the bench of the Supreme Court of the United States; but his greatness as a judge would hardly have been suspected by one who could have seen him, an old man among young men, throwing quoits at his home in Virginia. Harriet Martineau compared his disposition to that of "Uncle Toby." By nature modest, retiring, and a little uncouth, his bearing on the bench had nevertheless a certain indefinable dignity. His speech was simple, halting at first and measured, but gaining vigor as the argument progressed, enforcing conviction upon his hearers by the keenness of his logic, which cut aside irrelevant matters and lay open in its true bearings the single point at issue. His opinions were terse and cogent, written in a vehement style well chosen to present

the infallible logic of his reasoning. Marshall was not a scholar of the common law; his early studies were cut short by his active campaigning in the Revolutionary War. His mind was of the kind that reasons out a system for itself. For expounding international law he received training when Minister to France at the time of the X Y Z letters, when member of Congress, and later when Secretary of State to President Adams. For creating the constitutional law of the nation he had the best possible preparation in supporting the Constitution at the convention of his native State, and in defending the policy of the first administrations. His opportunity as Chief Justice to form the constitutional law of the land was unparalleled, and he performed the task ably. The power of the Supreme Court to revise the decisions of State courts, the power of Congress to establish a national bank, the exemption of the machinery of Federal government from State taxation,—these are but a few of the many fundamental questions which came before him to be decided for the first time. His principle was that of neither broad nor narrow construction; he strove simply to give to the words of the Constitution the meaning which all the surrounding circumstances showed to be the obvious one. In deciding the meaning he could but choose the meaning obvious to himself, that is, to a man imbued with the strongest federalist convictions in favor of a centralized government. His positions seem to us at times forced or pedantic; and yet it is hard to see how a man of strong convictions could have avoided his failing. His service was in creating a strong national government in the face of jealous States, when a strong government was sorely needed.

Closely associated with Marshall in his judicial life, although some years his junior, was a New England man, Joseph Story. He was born at Marblehead, on the Massachusetts coast, and grew up with a passion for the sea, the impetuous, emotional, and mystery-loving temperament which draws its breath from the ocean. He was a handsome man, well-dressed, a fluent and cultivated talker, one of those who would be singled out among a roomful as a leader of men. Story graduated with high honors at Harvard College, became member of the State legislature, and later of Congress. His life, however, was mainly given to legal study, and he was pre-eminently fitted for the position on the Supreme Bench of the United States to which he was appointed by President Jefferson in 1811. He was a scholar; the Year Books were his friends, and the old English Chancery Reports his companions. Constitutional law he learned from Marshall, in spite of the fact that he was a Republican in politics; but international law and the law of Admiralty and Prize Courts he made his own; and with Chancellor Kent he shares the credit of having originated equity practice in America. He was a bitter enemy of slavery; and his addresses to the grand juries in condemnation of the slave trade were influential in stamping out the last traces of slavery in New England. In 1829 he received the appointment as Dane Professor of Law at Harvard University. There he lectured without notes, for his immense store of knowledge was always at his command; often he would talk for an hour on a point which it had not occurred to him beforehand to mention. The lectures were popular, always suggestive, often impressive. Beside these labors, Story was an indefatigable writer, his works showing great learning, and seldom being open to the imputation of error or inaccuracy to which the impulsive mind of the writer might have led. His writings have the merit, rare in law books or judicial opinions, of having a literary style.

The style is clear and flowing, drawing illustrations from the sources to which the author's scholarship gave him access. It is in striking contrast with Marshall's intensely focussed style; but it is none the less clear, and it has a richness which Marshall's lacks. The books have laid the foundations of an international reputation; and it was owing to them that Lord Campbell in the House of Lords in 1847 spoke of Story as "greater than any law writer of which England could boast, or which she could bring forward since the days of Blackstone."

RECENT CASES.

BILLS AND NOTES — ALTERATION — ESTOPPEL BY NEGLIGENCE. — H desiring to borrow money through her agent, signed a note for \$500, written with a lead pencil. The agent raised the note to \$1,200, and sold it for that amount to plaintiff, a *bona fide* purchaser. *Held*, that H is liable for \$500 only. *Walsh v. Hunt*, 52 Pac. Rep. 115 (Cal., Sup. Ct.).

This case must be added to the increasing line of cases *contra* to the doctrine of *Young v. Grote*, 4 Bing. 253, that one who facilitates, by careless execution, the alteration of a negotiable instrument is liable to an innocent purchaser for the amount of the instrument in its altered form. This doctrine, which rests upon estoppel by negligence, appears to be the better view, and more consistent with the conception of a negotiable instrument. These instruments are intended to pass freely from hand to hand, and the principal case tends to interfere with their free circulation. See 10 HARV. LAW REV. 185.

BILLS AND NOTES — CONDITIONAL DELIVERY. — The maker of a note delivered it to the payee's agent on condition that it was not to take effect until signed by X, but the latter's signature was never obtained. *Held*, that these facts cannot be set up in defence in an action by the payee against the maker. *Hurt v. Ford*, 44 S. W. Rep. 228 (Mo.).

There is an almost hopeless conflict of authority as to whether there can be a conditional delivery of a note to the payee or his agent. Some courts have followed the strict rule as to deeds, that delivery in escrow can be made only to a stranger, while others have reached the same result by applying the parol evidence rule. *Stewart v. Anderson*, 59 Ind. 375; *Mossman v. Holscher*, 49 Mo. 87. In England and in most of the jurisdictions in this country in which the question has arisen the courts have consistently applied to negotiable instruments the doctrine of *Pym v. Campbell*, 6 E. & B. 370, that the parol evidence in such a case does not tend to vary an existing written contract, but shows that no contract ever existed unless the contingency occurred upon which it was to take effect, and that therefore the parol evidence rule has no application. The old rule as to deeds is technical and should not be extended. *Merchants, etc. Bank v. Luckow*, 37 Minn. 542; *Alexander v. Walker*, 11 Lea, 221; *Burke v. Dulaney*, 153 U. S. 228. Of course if the note has come into the hands of a *bona fide* purchaser, the maker should be estopped to deny a valid delivery to the payee.

BILLS AND NOTES — CHECKS — REFUSAL OF PAYMENT. — A check was drawn on a bank where there were not sufficient funds to meet it. The drawer ordered payment stopped, but later increased his deposit above the amount of the check. *Held*, that the bank is liable to the holder for a subsequent refusal to honor although the order of the drawer had not been countermanded. A bank upon receipt of a deposit agrees "with the whole world" to honor presented checks if there are sufficient funds, and a secret understanding with the depositor is no defence to the holder's rights. *Gage Hotel Co. v. Union Nat. Bank*, 49 N. E. Rep. 420 (Ill.).

The Illinois cases have affirmed the right of a check-holder to compel payment by a bank on two grounds: first, that a check is an assignment *pro tanto* of the deposit; see 11 HARV. LAW REV. 548 for an adverse criticism of a late Illinois case taking this view; second, the ground of "implied contract" taken in the principal case. A check is an assignment when drawn, if at all. Since at that time there were not sufficient funds to meet it, the principal case, if sound, must be rested on the theory of "implied con-

tract." The phrase seems to be used in the sense of an obligation imposed by law to pay checks when presented, — a quasi-contractual rather than a contractual obligation. This must be imposed because such is the general custom and understanding of the commercial community, and upon this the Illinois court rests its decisions. It is believed, however, that the commercial understanding is that banks are under a duty to no one but the drawer to pay checks, and to him solely by virtue of the contract of deposit; and certainly that there is no other legal obligation where, as in the principal case, payment is ordered stopped by the drawer. On the general question the authorities are about evenly divided. See 2 Morse, Banks, § 490 *et seq.*

CARRIERS — WRONG TICKET — EJECTION. — Plaintiff requested and paid for a ticket to A. The ticket agent through mistake gave her a ticket to B, which she presented to the conductor with proper explanations. She was ejected for not paying fare to A. *Held*, that the company is liable. *Ala. & Vicksburg Ry. Co. v. Holmes*, 23 So. Rep. 187 (Miss.).

The case follows an earlier decision in the same State, *K. S., M. & B. R. R. Co. v. Riley*, 68 Miss. 765, which is put upon the ground that any regulation of the carrier requiring the conductor to eject a passenger under the above circumstances is unreasonable. This is contrary to the great weight of authority and seems unsound. *Bradshaw v. So. Boston R. R. Co.*, 135 Mass. 407. It is generally held that as between passenger and conductor the face of the ticket is conclusive evidence of the passenger's right to carriage. *Frederick v. M. H. & O. R. R. Co.*, 37 Mich. 342. This rule is frequently rested upon the practical reason that a proper regard for the convenience of passengers and the security of the company in collecting fares makes it impracticable for the conductor to regard other evidence of the passenger's right to carriage than his ticket. But there seems to be a more substantial ground on which to support these cases. The ticket is itself the only contract of carriage, and the passenger cannot complain because he is not carried to some other destination than that specified in his contract. 9 HARV. LAW REV. 353.

CONSTITUTIONAL LAW — ADDITIONAL SERVITUDE — ELECTRIC RAILROADS. — *Held*, that the construction of an electric railroad, with poles and overhead wires, imposes an additional servitude, not consistent with the purposes for which a street is dedicated. *Jaynes v. Omaha Street Railway Co.*, 74 N. W. Rep. 67 (Neb.).

There is much conflict on the question of what uses may properly be considered to be within the original dedication of a highway to the public. Some courts have held that nothing is granted but the bare right of passage over the surface; *Western Union Tel. Co. v. Williams*, 86 Va. 696; others, that there is a general right of inter-communication. *Pierce v. Drew*, 136 Mass. 75. As to modes of conveyance over the surface, the true view seems to be, that it makes no difference what the motive power is, nor whether acquired from above or below, so long as the road is fairly and substantially usable as a highway. *Taggart v. Newport Street Ry. Co.*, 16 R. I. 668; *Halsey v. Rapid Transit Street Ry. Co.*, 47 N. J. Eq. 380. In the principal case, while the court seems to agree with this test, it finds as a matter of fact that a trolley road interferes with the substantial use of the highway.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — EIGHT-HOUR LAWS. — *Held*, that a State statute forbidding the employment of workmen for more than eight hours per day in mines and smelting-works is a valid police regulation for the protection of health, and not a violation of the Fourteenth Amendment. *Holden v. Hardy*, 18 Sup. Ct. Rep. 383.

It was argued that there was a deprivation of property without due process of law and a denial of the equal protection of the laws in that the contracting power of a certain class of employers and laborers was limited by the statute. The decision in effect reaffirms the conservative construction of the term "property" which has been customary in the decisions of the Supreme Court. The case, therefore, is important in view of the tendency in some State courts to construe the terms "liberty" and "property" very broadly, and under cover of these terms to deny the validity of paternal legislation. *Commonwealth v. Perry*, 155 Mass. 117; *Braceville Coal Co. v. The People*, 147 Ill. 66; *State v. Loomis*, 115 Mo. 307. Paternalism is often very objectionable, but it is clearly a matter of policy. The opinion in the principal case also shows clearly that legislation is a progressive science, which can be satisfactorily developed only with the aid of experiments. It is not the province of the courts under our constitutions to stand in the way of these experiments. For an admirable discussion of this subject, see the dissenting opinion of Barclay, J., in *State v. Loomis*, *supra*.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EVIDENCE. — A statute of Virginia provides that a common carrier accepting goods for transportation to a point

beyond its terminus assumes an obligation for their safe carriage to that point unless otherwise provided by a written contract signed by the shipper. (Code Va. [1887], §1295.) *Held*, that this statute as applied to interstate commerce is not void under the Federal Constitution, but is merely a rule of evidence. *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 18 Sup. Ct. Rep. 335. See NOTES.

CONSTITUTIONAL LAW — TAXATION — FOREIGN-HELD MORTGAGES. — In Oregon, where the legal title to land mortgaged does not pass to the mortgagee, a statute provided that the interest of the mortgagee be taxed, and that the amount so taxed be deducted from the assessment of the mortgagor. *Held*, that the statute is constitutional. *Savings & Loan Soc. v. Multnomah County*, 18 Sup. Ct. Rep. 392.

The court relies squarely upon the ground that the lien of the mortgagee is an interest in the land and not a mere chose in action. A chose in action, such as the debt for which the mortgage is security, is taxable only at the domicile of the creditor. *State Tax on Foreign Held Bonds*, 15 Wall. 300. But an interest in land is taxable wherever the land is situated. The principal case is important in limiting the broad doctrine laid down by Field, J., in *State Tax on Foreign Held Bonds*, *supra*.

CONTRACTS — ANTICIPATORY BREACH. — *Held*, that where one party to a contract gives notice of his intention not to carry out his contract, the other party may treat this as an anticipatory breach, and sue for damages before the time for performance arrives. *Horst v. Rockm.* 84 Fed. Rep. 565 (Pa., Cir. Ct.).

The case follows *Hochster v. De La Tour*, 2 E. & B. 678, and is interesting from the fact that the question of anticipatory breach has seldom been adjudicated in this country. The only State which has adopted the English view is Iowa, while Massachusetts and Nebraska have refused to follow it. *McCormick v. Basal*, 46 Iowa, 236; *Daniels v. Newton*, 114 Mass. 530; *Carston v. McDonald*, 38 Neb. 857. In the United States Supreme Court the question was expressly left open. *Dingley v. Oler*, 117 U. S. 490. The criticism of the doctrine of anticipatory breach in *Daniels v. Newton*, *supra*, appears sound, but it is possible that in courts where the question has not yet been decided certain grounds of convenience may prevail over the objections on principle, and an action for breach of contract be allowed before the time for performance has arrived.

CONTRACTS — STRANGER TO THE CONSIDERATION. — Defendant made a contract with an employee to furnish him with medical attendance in case of accident. The employee was injured, and plaintiff, a physician, attended him. *Held*, that defendant is not liable to plaintiff for the services rendered. *Thomas Mfg. Co. v. Prather*, 44 S. W. Rep. 218 (Ark.).

The majority of American jurisdictions, including Arkansas, hold that a sole beneficiary of a contract, though a stranger to the consideration, may sue the promisor. *Chamblee v. McKensie*, 31 Ark. 155. The principal case, however, refuses to allow the beneficiary to sue at law, when the contract looks to the satisfaction of a valuable claim which he has against the promisee. Public policy may demand that a sole beneficiary be given a remedy directly against the promisor, as otherwise he is without relief; but it is difficult to support an action at law on the principles of contract. In any event there is no such public policy in the principal case, and the decision therefore seems sound, although contrary to *Lawrence v. Fox*, 20 N. Y. 268, and the great weight of American authority. See 11 HARV. LAW REV. 415.

CRIMINAL LAW — DOCTRINE OF ESTOPPEL. — Defendant, a public officer, was indicted for embezzlement under a statute enacting that if any one charged with the receipt or safe-keeping of the money of the State convert any part of the same to his own use, he shall be guilty of embezzlement. Defendant collected some fees from insurance companies, which were by law made payable in advance into the State treasury, and converted them to his own use. *Held*, that defendant is not within the description of the statute, and is not estopped to deny that the fees were the money of the State. *Moore v. State*, 74 N. W. Rep. 319 (Neb.). See NOTES.

EQUITY — PRIORITY — ESTOPPEL. — The second of two equitable mortgagees took his mortgage, believing the property unincumbered. This belief was caused by the mortgagor's possession of the title deeds, which had been left in his hands by the prior mortgagee. *Held*, that the prior mortgagee is precluded from asserting priority. *In re Castell & Brown*, [1898] 1 Ch. 315.

Although as between two equitable claimants against the same person for the same thing the prior prevails, *Tyler v. Webb*, 6 Beav. 552, yet he may lose his advantage by his words or conduct. The possession of title deeds leads to a reasonable belief that the holder is the owner of unincumbered property. The second claimant acted on such a

belief. The prior claimant was therefore properly held to have estopped himself by reason of his negligence in not securing possession of the deeds. In accord with the principal case are numerous other decisions in England and in this country. *Farrand v. Yorkshire Banking Co.*, 40 Ch. D. 182; *Besson v. Eveland*, 26 N. J. Eq. 468. Similarly, a legal mortgagee, by reason of his fraud or negligence, has been postponed to a subsequent equitable claimant. *Northern Counties, etc. Co. v. Whipp*, 26 Ch. D. 482.

EXECUTIONS — GARNISHMENT OF JUDGMENT DEBTS. — *Held*, that a judgment debt is subject to trustee process from the court in which the judgment was recovered. *Isabelle v. Le Blanc*, 39 Atl. Rep. 436 (N. H.).

Held, that a judgment debt is not subject to garnishee process from any other court. *Eisenberg v. Burchinell*, 52 Pac. Rep. 220 (Colo., Sup. Ct.).

These two cases together state and define the better doctrine as to garnishment of judgments, though there is authority *contra* to both. In some States it is held that a judgment debtor cannot be garnished in any event, because he would be unfairly burdened and exposed to double liability. *Black v. Black*, 32 N. J. Eq. 74. The force of this argument is very slight where the garnishee process is in the court which rendered the judgment, as the court can then easily protect the debtor, at least before execution has issued. The weight of American authority seems to be in favor of a more liberal view, and a few courts have gone so far as to make judgment debts subject to garnishment in any court. *Fithian v. R. R. Co.*, 31 Pa. St. 114. This is going too far, however, because, if the judgment and the garnishee process are in different courts, a conflict of jurisdiction arises, and the debtor can protect himself only by applying for an injunction against his creditor, or by similar expensive and troublesome proceedings.

NUISANCE — ABATEMENT. — A ditch draining the defendant's land filled up through natural causes and a pond formed on the premises. The water in this stagnated and became annoying and injurious to the neighborhood. *Held*, that this is not a nuisance in the legal sense, and the Justices of the Peace cannot order its abatement under Civil Code, § 4760. *Roberts v. Harrison*, 28 S. E. Rep. 995 (Ga.).

The court goes on the ground that a legal nuisance cannot result from natural causes alone, but that the act of man must have contributed to its existence. The very meagre authority on the subject in this country supports the present case. 1 Wood, Nuis., § 116; *Barring v. Com.*, 2 Duv. 95 (Ky.); *State v. Rankin*, 3 S. C. 438. The opposite view is suggested in 1 Bish., Cr. L., §§ 316, 828. This is upheld by the authority of an early English decision. *King v. Wharton*, 12 Mod. 510, and seems to be the correct view. It is the existence of the nuisance which is complained of as injurious to the public. To say that it shall be allowed to continue because it is the result of natural causes seems to give an inadequate reason either on the ground of principle or public policy.

PERSONS — INFANT'S CONTRACTS — RECOVERY OF CONSIDERATION. — The plaintiff, an infant, agreed to purchase a bicycle, and received it, and made partial payments thereon. She used it three months, and then returned it and demanded the money she had paid. *Held*, that she can recover the amounts so paid without diminution for the use of the bicycle or for any deterioration in value which was the ordinary result of such use. *Rice v. Butler*, 44 N. Y. Supp. 494 (Sup. Ct., App. Div.).

This decision does not seem to be distinguishable on principle from *Bartholomew v. Finnemore*, 17 Barb. 428. There an infant gave certain goods in exchange for a horse. He afterwards rescinded the contract, but it was held that he was entitled to recover the value of his goods only on returning the consideration received by him, and that a return of the horse in a depreciated condition was not a return of the consideration received. The principal case, however, places New York in accord with the few authorities in this country. *Whitcomb v. Joslyn*, 51 Vt. 77; *McCarthy v. Henderson*, 138 Mass. 310. There is great conflict of authority as to whether an infant who rescinds a contract of purchase can recover the consideration paid without returning the goods purchased. His right to recovery, however, if he does return, seems settled. To allow recoupment for the use of the goods, or for deterioration not the result of the infant's tortious conduct, would subject him indirectly to a liability which could not be enforced directly on account of his infancy. *Stack v. Cavanaugh*, 30 Atl. Rep. 350.

PROPERTY — IMPLIED RESERVATION OF EASEMENTS. — A land-owner sold part of his estate without expressly reserving a way through the part disposed of. The part retained could be reached only by ocean or through the part sold. *Held*, that the access by sea will prevent the implied reservation of a way by land. *Hildreth v. Googins*, 39 Atl. Rep. 550 (Me.). See NOTES.

PROPERTY — EJECTMENT — MUNICIPAL CORPORATIONS. — *Held*, that a municipal corporation may maintain ejectment for the recovery of a street dedicated to public use by the owner of the fee. One judge dissenting. *City and County of San Francisco v. Grote*, 52 Pac. Rep. 127 (Cal., Sup. Ct.).

The better view, and the one supported by the weight of authority, is that taken in the dissenting opinion. Sedg. & Wait, Tr. Title to Land, Chap. VIII. The city had only an easement in the street, and an easement does not constitute an estate in lands. To allow the grantee of an easement to bring ejectment is a plain departure from the common-law rule which requires some corporeal estate to support that form of action. *Rowan v. Kelsey*, 18 Barb. 484. The majority of the court argued that the city gets such an interest as is necessary for the enjoyment of its rights in the street, and that this interest is sufficient to support the action. But it is equally true that a private easement carries with it such an interest in the land over which it extends as is essential to its proper enjoyment, and the grantee of a private easement has never been allowed to bring ejectment. It seems that the rights of the public may be fully protected by indictment, injunction, or an action for maintaining a nuisance.

PROPERTY — EXCHANGE OF LANDS. — Plaintiff conveyed certain land to defendant, and received in consideration therefor a deed from defendant of certain other land and \$25 in money. The word "exchange" was not used in either conveyance. *Held*, that the transaction was not a technical common-law exchange, so as to contain an implied warranty of title by both parties. *Windsor v. Collinson*, 52 Pac. Rep. 26 (Ore.).

The case is interesting as a surviving bit of mediaevalism, and as illustrating the fact that, even in these days of statutory alterations, a knowledge of Coke and Littleton may become of practical importance. All the authorities are agreed that the word *escambium*, or "exchange," is as necessary to this form of conveyance as the word "heirs" to the creation of a fee; and this alone was sufficient to decide the case. 2 Black. Com. 323. In the opinion of the court, the fact that money was paid by one party was equally fatal; and some cases in this country support that position. *Long v. Fuller*, 21 Wis. 122. The older authorities, however, make no mention of such a requirement; and this omission is, perhaps, significant. Sheppard's Touchstone, 294. The plaintiff was correct in his contention that an implied warranty was an incident of a technical exchange. Upon a failure of title to the land received, either party was entitled to re-enter on the land given by him in exchange. Sheppard's Touchstone, 290.

PROPERTY — RECORDING ACTS — CONSTRUCTIVE TRUST. — Plaintiff's agent, A having spent \$1,000 intrusted to him by plaintiff to loan on mortgage security, had a friend execute a mortgage to plaintiff on certain land, to which in fact neither the friend nor A had any title. A fraudulently told plaintiff that the mortgage was a good lien on the land, and thereupon the latter accepted it and had it recorded. Later A bought the land himself and afterward assigned it for the benefit of his creditors. *Held*, that the assignee took the land free from any equity in plaintiff. *Robertson v. Rents*, 74 N. W. Rep. 133 (Minn.).

By the laws of Minnesota a deed, mortgage, or an express trust is not good against an assignee in insolvency unless recorded, but an implied or resulting trust is. The reasoning of the court is as follows. The creditors would have no constructive notice of the mortgage from the record because it was made by a stranger to the title, and therefore it is to be taken as unrecorded. By estoppel against A it is to be considered as if actually made by him to plaintiff, but being unrecorded it is not good against the assignee in insolvency. The reasoning is specious but unsound. A by his false representations is estopped to deny that the mortgage is a valid lien on the land, but plaintiff's claim is certainly in the nature of a constructive trust, arising by implication of law from A's fraud. Plaintiff used due diligence by recording the mortgage as he understood it, and to punish him for not recording a claim arising out of a fraud of which he knew nothing, — a claim in its very nature unrecorded, — is to pervert the registry laws to a strange use.

PROPERTY — RULE IN SHELLEY'S CASE. — Testator devised lands to A for life, remainder to his heirs. *Held*, that the rule in *Shelley's Case* does not apply, and A takes only a life estate. *Wescott v. Benford*, 74 N. W. Rep. 18 (Iowa).

The court rests its decision on the ground that a strict application of the rule in *Shelley's Case* would defeat the intention of the testator as to the life estate to A. As was conclusively shown in *Van Grutten v. Foxwell*, [1897] A. C. 658, the rule in *Shelley's Case* is not a rule of construction, but an absolute rule of property. Its object, it may be said, is to defeat the intentions of the testator when they run counter to it. Rules of construction may be employed to discover what was meant by the word "heirs." If it means a particular class the rule does not apply. If it means heirs in a general sense, as it did in the principal case, the rule should be applied notwithstanding

the intention of the testator. The harshness of the rule, which influenced the decision in the principal case, while it may be a good reason for its abolition, furnishes no excuse for construing it into something which it is not. See 11 HARV. LAW REV. 418.

PROPERTY — SEPARATE USE — RESTRAINTS ON ALIENATION.— A woman in contemplation of marriage conveyed all her property to a trustee in trust for herself for life, for her separate use, without power of anticipation. After her marriage, she borrowed money from plaintiff, expressly charging her separate estate. *Held*, that the income is liable in the hands of the trustee for the satisfaction of plaintiff's claim. *Brown v. McGill*, 39 Atl. Rep. 613 (Md.). See NOTES.

QUASI CONTRACTS — QUANTUM MERUIT.— A statute provided that convicts should not be required to labor on certain holidays. The defendant, a lessee of convict labor, compelled the plaintiff, a convict, to work on the prescribed days. *Held*, that the plaintiff cannot recover in an action of contract the value of such labor. *Glass Iron & Steel Co. v. Harvey*, 22 So. Rep. 994 (Ala.).

Apparently the court failed to recognize the distinction between a contract implied in fact and a duty to pay which the law will raise when one person is unjustly enriched at the expense of another. Such a duty may be enforced in a contractual form of action, and seems clearly to have arisen in the principal case. The court admit the plaintiff's right to damages in trespass. It appears that he should have been permitted to waive this right and to recover in contract the value of the benefit received by the defendant. *Patterson v. Prior*, 18 Ind. 440.

SALES — CONTRACT OF EXCHANGE — STATUTE OF FRAUDS.— On Saturday, the plaintiff and defendant verbally agreed to exchange horses. The defendant received the plaintiff's horse on Sunday, and the next day, repudiating the bargain, he returned him to the plaintiff. In an action of replevin, *held*, that the contract of exchange was within the Statute of Frauds, and that the statute was not satisfied by the receipt of the horse on Sunday. *Ash v. Aldrich*, 39 Atl. Rep. 442 (N. H.).

Contracts of exchange are not contracts of sale, and, as an original question, it is very doubtful whether the former should be held to be within the Statute of Frauds. However, courts have so often assumed them to be, without discussion, that the principal case would probably be generally followed on this point. *Browne*, Statute of Frauds, 5th ed., § 293. The decision of the court upon the other point presented is open to some doubt. The New Hampshire statute declares that no contract shall be valid unless the statute has been complied with. In other jurisdictions, with similar statutes, it is the settled construction that the Statute of Frauds presupposes a completed legal contract, and the requirements of the statute must be fulfilled simply as a prerequisite of bringing an action. *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Maddison v. Alderson*, 8 App. Cas. 467. Under such a construction, a verbal contract made on Sunday would be unenforceable, although the statute was satisfied on a weekday. It would seem to follow that the time of satisfying the statute is of no importance, and if the contract was not made on Sunday it should be enforced. *Browne*, Statute of Frauds, 5th ed., § 138 b.

SALES — ESTOPPEL — CONDITIONAL DELIVERY.— The plaintiff sold goods to D' part payment to be made in cash. The goods were shipped and delivered without the cash payment. The plaintiff knew D was a tradesman and would put the goods on sale. D sold to the defendant and the plaintiff replevied them, claiming title. *Held*, the plaintiff is estopped to deny that he parted with his title. *Lewenberg v. Hayes*, 39 Atl. Rep. 469 (Me.).

It was apparently the theory of the court that the plaintiff intended to retain title to the goods, since part payment was to be made in cash. Such a doctrine is often applied to small transactions. *Bussey v. Barnett*, 9 M. & W. 312. In commercial transactions, however, when goods are ordered to be shipped, the title presumably passes on shipment. *Long v. Fragano*, 4 B. & C. 219. In the principal case, the stipulation for cash payment would hardly show a different intention, but would merely indicate that the plaintiff retained a lien on the goods. His voluntary delivery to D would terminate that lien and D's title would become perfect. *Hoskins v. Warren*, 115 Mass. 515. Assuming, however, that D had no title, the defendant's right to the goods was unimpeachable, without invoking the doctrine of estoppel. The plaintiff, by intrusting his goods to one whom he knew would sell them, impliedly authorized a sale, and the defendant, being a *bona fide* purchaser, would acquire a good title. *Spooner v. Cummings*, 151 Mass. 313.

SALES — RESCISSION BY SELLER — TENDER OF PARTIAL PAYMENT.— The plaintiff, induced by fraud, sold goods to the defendant. The defendant made a payment on account and then sold part of the goods to a *bona fide* purchaser. *Held*, that the

plaintiff may replevy the goods still retained by the defendant without tendering back the money paid on account. *Forwell Co. v. Hilton*, 84 Fed. Rep. 293 (Wis. Sup. Ct.).

It is commonly said that a vendor, before he can rescind a contract of sale, must return anything of value which he has received from the vendee. Benjamin, Sales, 6th ed., 445. The court recognizes that such a proposition is true as a general rule, but refuses to apply it to the present case. The result is surely just. Since the rights of no third person are involved, the vendee should not be allowed to take any advantage of his own misconduct. To require a repayment of the money received on account, as a condition precedent to the right to rescind, would put a premium on fraud; it would be idle as well, since the vendor, if he rescinded and recovered a part only of the goods, could probably also sue and recover the price of the balance. *Powers v. Benedict*, 88 N. Y. 605; *Sleeper v. Davis*, 61 N. H. 61. The weight of authority is in accord with the principal case. *Sloane v. Shiffer*, 156 Pa. St. 59; *Sisson v. Hill*, 18 R. I. 212.

TORTS — CONVERSION — CHATTEL MORTGAGES. — A chattel mortgage gave the mortgagee power to take possession and sell on default or if he felt insecure. Defendant, a sheriff, served the summons in a foreclosure action and took possession against the protest of the mortgagor. *Held*, that the mortgagee could not take possession without the consent of the mortgagor, and that the sheriff is liable to the mortgagor for conversion. *McClellan v. Gaston*, 51 Pac. Rep. 1062 (Wash.).

In a similar case, the mortgagee was held liable for trespass when he took possession accompanied by an officer who had no legal process but who acted *colore officii*. *Thornton v. Cochran*, 51 Ala. 415. This decision has been supported on the ground that the taking was by threat or constructive force. Jones, Ch. Mort., 4th ed., § 705. A subsequent Alabama decision holds that such cases should be subject to the rules governing recaption, and the former case seems doubtful. *Street v. Sinclair*, 71 Ala. 110. The present case would hold the sheriff liable even though he acted in a private capacity as agent of the mortgagee. The power granted in the mortgage to take possession gives the grantee a license which becomes irrevocable on default. *McNeal v. Emerson*, 81 Mass. 384. On default also the mortgagee gets an absolute title and a right to immediate possession. It seems then that the mere protest of the mortgagor should not make the taking of possession either a trespass or a conversion. *Landon v. Emmons*, 97 Mass. 37; Jones, Ch. Mort., 4th ed., §§ 434, 774.

TORTS — INN-KEEPER'S LIABILITY. — The defendant, a hotel-keeper, contracted with a club to furnish a banquet at his hotel. The club invited the plaintiffs, who took a room at the hotel for the night. While at the banquet their hats were lost from the hat-rack without negligence on the part of the defendant. *Held*, that the defendant is not liable for the loss. *Amey v. Winchester*, 39 Atl. Rep. 487 (N. H.).

The decision shows the tendency of the courts to limit the strict common-law liability of inn-keepers, and it seems to go farther in that direction than previous cases. It may be questioned whether it does not go too far. It is settled that the peculiar relation of inn-keeper and guest does not arise when the inn is visited for some special purpose, not connected with passage or travel. Such is the case when one goes on the invitation of the inn-keeper, or of a guest of the inn, or of some third party who has hired the inn. *Calye's Case*, 8 Coke, 32; *Carter v. Hobbs*, 12 Mich. 42; *Fitch v. Casler*, 17 Hun, 126. In the present case, however, the plaintiffs were guests of the inn by virtue of having taken a room there, but they were deprived of their rights as such, because, at the time of the loss, they were using the inn for a purpose not contemplated by the relation of inn-keeper and guest.

TORTS — JOINT TORT-FEASORS — TENDER. — The plaintiff had obtained a judgment against one of two joint tort-feasors, and had been tendered the amount of the judgment by him. *Held*, that this is a bar to an action against the other. *Berkley v. Wilson*, 39 Atl. Rep. 502 (Md.).

The English view in such a case is that judgment without satisfaction will prevent recovery. *Brown v. Wooton*, Cro. Jac. 73. In this country generally the opposite view prevails, unless the judgment be completely satisfied. 11 HARV. LAW REV. 556. In the principal case the court declines to decide this question, considering tender equivalent to satisfaction. If the American rule be correct, it is difficult to see how the plaintiff can be said to lose his right of action by refusing to accept payment, since it lay in his option to enforce the judgment or bring an action against the defendant. The defendant's wrong was not rendered less by reason of the tender. Even the plea of satisfaction is only effectual on the ground that double compensation will not be allowed, and not because the defendant's act becomes less tortious. Moreover, other courts have not considered a tender as satisfaction. *People v. Beebe*, 1 Barb. 379; *Lincoln Savings Bank v. Ewing*, 12 Lea, 598.

TORTS—MALICIOUS ABUSE OF PROCESS—SATISFACTION.—The defendant maliciously directed an officer to levy an attachment on the goods of the plaintiff, who was not his judgment debtor. The plaintiff replevied the goods from the officer, and in the replevin suit obtained a judgment against the officer for damages, which remain unpaid. *Held*, that the return of the goods is not a bar to this action against the defendant for malicious abuse of process. *Vincent v. McNamara*, 39 Atl. Rep. 444 (Conn.).

It is settled that an action for malicious abuse of legal process will lie where a wrongful attachment is levied. Recovery was therefore properly allowed for damages to the goods and business losses sustained by the plaintiff by reason of the attachment. *Zinn v. Rice*, 161 Mass. 571. The decision is correct also on another ground. The return of the goods alone was only partial satisfaction, and therefore, according to the weight of American authority, was not a bar to the present action against a joint tortfeasor. *Lovejoy v. Murray*, 3 Wall. 1. For this reason the result in the principal case seems preferable to that reached in *Karr v. Barstow*, 24 Ill. 580. The court there decided that a recovery in replevin with a return of the goods is a bar whether the damages awarded in the replevin suit be paid or not, because "the return is a satisfaction for the trespass."

TRUSTS—GIFT OF CHOSE IN ACTION—BOOK OF ACCOUNTS.—An intestate delivered to the plaintiff as a gift his book of accounts. In an action against the administrator to recover the proceeds of the accounts subsequently collected by him, *held*, that the plaintiff is entitled to recover. *Jones' Admr. v. Moore*, 44 S. W. Rep. 126 (Ky.).

It was held in *Ashbrook v. Ryan*, 2 Bush, 228, that a gift of an ordinary depositor's pass-book is not a valid gift of the deposit. A pass-book is generally regarded as not sufficiently resembling a specialty obligation to make its transfer a transfer of the debt. This reasoning seems to apply equally to an account-book. The principal case may be supported on the theory that the delivery of the book vested in the donee an implied power of attorney to collect the debt for his own benefit, which power was irrevocable because coupled with an interest, viz., legal title to the book. The term "legal interest," however has hitherto been restricted to something necessary to the collection of the debts; nor have the courts regarded these transactions as transfers of powers of attorney.

REVIEWS.

LAW AND POLITICS IN THE MIDDLE AGES. By Edward Jenks. New York: Henry Holt & Co. 1898. pp. xiii, 352.

This book is a valuable contribution to legal history. It is a lucid exposition of those ideas and institutions which have had an abiding influence upon law and government. In the first two chapters Austin's doctrine, that law is the arbitrary command of the State, is shown to be untrue as regards the Middle Ages. The *leges barbarorum* and the feudal customals were more or less declaratory of existing usages. Changes or reforms were adopted in practice and then declared to be law. It is not until England produces the first national law of medieval Europe, after the establishment of Parliament by Edward I., that Austin's doctrine becomes approximately true. In succeeding chapters the writer traces the early history of the State and of the administration of justice; the origin of the village, the hundred, and the shire; and the inception of our ideas of property and contract. Chapter V. contains an admirable account of how the local districts in France and Germany became fiefs, while in England the Anglo-Norman kings converted the shires into State districts administered by royal officials, and thus succeeded in reconciling a strong monarchy with local government. Students of legal history will

be particularly interested in Chapters VI. and VII., which deal with the origin of property and contract.

The philosophic principle which runs through all the author's investigations is the conflict between the State and the clan; this, he says, is "the key to the internal politics of the Middle Ages." He seems at times to exaggerate this struggle and to postulate with too much freedom the survival of the clan. It is difficult, for example, to follow him when he refers to the "moots of the clan" during and after the ninth century (pp. 125, 132), though he evidently means the local popular courts. Nor can we agree with him that the gild and the monastery are artificial forms of the clan (p. 309).

In Chapter III. he seems to ascribe too much influence to the feudal element in developing the royal power, especially in France, and too little influence to the Romanizing legists.

But we feel more inclined to praise than to criticise this volume. Mr. Jenks has, indeed, produced a book of great merit, which displays wide learning in the comparative history of the legal systems of the Middle Ages. In a work so broad in view and covering so much ground we must expect to find some errors of fact, like the statement that Hugh the Great was king of the Western Franks (pp. 85, 87); but such slips do not seem to be frequent. The treatise as a whole may be warmly recommended to students of legal and constitutional history. No other English book contains so good and comprehensive an account of early Teutonic systems of law.

C. G.

THE SCIENCE OF LAW AND LAWMAKING. By R. Floyd Clarke. New York: The Macmillan Co. 1898. pp. xvi, 451.

Mr. Clarke's book should be welcomed as affording to the general reader an introduction to the study of law suggestive of the beauty and interest of its problems, and as giving for the first time a comprehensive discussion of the problem of codification. The book is not a complete or exhaustive treatise on "the science of law," a subject whose scope is not within such moderate limits; but the writer has attempted merely to outline in brief the source of law, its relation to other sciences, and its gradual development into case and code law. A bird's-eye view of the English law as it exists to-day in its various branches, with an explanation of the technical terms used, puts the general reader in a position to pursue intelligently the problem of "codification *versus* the case law system," — a question that is strangely ignored by many of our better citizens.

In advocating the cause of the case law system, the real substance of the book, the writer has accomplished his purpose well. The division of the chapters into so many headings adds little to the clearness or literary merit of the work, but the argument is, on the whole, coherent and convincing. By applying the principles of the decisions in the case law and the rules of the principal codes now in existence to one branch of law, contracts in restraint of trade, he demonstrates, by a comparison of the results, that a code can be brief only at the expense of accomplishing justice, or justice-giving only at the expense of all practical brevity. One great advantage of the case law system, as Mr. Clarke points out, is that a code, like a statute, must be followed according to the strict construction of the language used, while in a decided case all that is material is the

rule of law laid down and the reasons of justice with which it is supported. Case law deals with actual phenomena, the logical method of induction pursued in other sciences, while a code is merely a human abstraction to be applied to future cases, and as such either is unable to keep pace with economic growth and change of conditions, or else fetters the law in its true development. "Codification, presupposing infinite knowledge, is a dream."

S. H.

MEMOIRS AND LETTERS OF JAMES KENT. By William Kent. Boston : Little, Brown, & Co. 1898. pp. viii, 341.

The life of Chancellor Kent demands as of right the services of a historian ; and to giving an account of his life the great-grandson of the Chancellor has volunteered. This story is told in the main through the medium of letters, to which coherence is given by the comments of the biographer. The task of dealing with the subject in this manner is no easy one ; and one is compelled to admit that the task is here performed with indifferent success. The comments which are intended to throw the proper light and shade upon the letters run the risk at times of being perfunctory and didactic. The author's analysis, however, towards the end of the book becomes more spontaneous than in the earlier part, and gives more form to the whole. The selection of the letters is good. They are well arranged, are strongly individual, and show the strong personality of the man.

Kent's life was the resultant of the conflicting forces of legal energy, public spirit, literary assiduity, and a yearning for bucolic home life. His family life was simple and kindly. Through all his public career he writes of a secret longing to live apart with his family on some farm in the country ; but this dream was not realized until old age was overtaking him. His zeal in the pursuit of law and learning was indomitable ; yet he found time to indulge his passion for the *Belles Lettres* of ancient and modern times, and in his letters he reveals his taste in the literature he admired. His letters are also types of his own mastery of diction, the severe simplicity of style which bears testimony to his study of the ancient classics, especially the Latin. Work never killed the sensibilities in him, and yet a certain dryness, an eye to the practical matters of country life, at times crops out in his writing, as if by mistake. In one letter, for instance, after describing a thunder-storm in language full of vivid imagination he ends by saying : "It lasted about half an hour, and the lightning destroyed a barn full of wheat on the river against Newburgh."

The letters have revealed the man not only in his private life but also in his political life as supporter of the waning Federalist cause. The author's pretensions, however, are modest ; and in dealing with political events he consistently maintains the point of view of Kent's private life. He makes no attempt to describe the Chancellor's great contribution to our law and Constitution ; that contribution is still unwritten, and is known only by his works, his decisions and his Commentaries.

J. G. P

FIRST BOOK OF PRACTICE. By Lemuel H. Foster. Detroit, Mich.: Collector Publishing Co. 1897. pp. 488.

The subject of this work, as set forth in the table of contents, embraces the conduct of nearly every sort of proceeding at law or in equity, and at first glance the field seems rather large for careful treatment in so small a space. But on reading the book it appears that the author has wisely limited his discussion to a special part of this matter. He avoids comment on substantive law, and does not go into the technical requirement of statute, or the minor peculiarities of State practice. Where these points arise the fact is noted and the reader is referred to the proper authority. The book is designed primarily for the young lawyer, and its object is to "answer the numberless questions along practical lines that are not contained in law books generally." When a matter is easily accessible elsewhere, as a rule, it is passed over lightly. The result of this treatment is a very serviceable work in moderate space. The keynote is practical utility, and the book is full of suggestions, cautions, and advice; such matters as are the result of experience and are generally to be secured only by applying to some older lawyer. The author deals carefully with the various steps in beginning and carrying on the common-law actions; outlines the procedure in attachment, garnishment, drawing of wills, etc., and gives samples of forms in common use. He also gives careful directions on the preparation and trial of causes, and has full chapters on the codes and equity. Throughout these subjects the book contains all the necessary practical steps, and with its aid, as the author says, the young lawyer should be "reasonably secure against fatal blunders" in his first essays. The tone of the book is confident and sure, the style is clear, and it will doubtless prove a valuable aid to those beginning the practice of law.

G. B. H.

BOOKS RECEIVED.

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GENERAL DIGEST. American and English. Annotated. New Series. Rochester: The Lawyer's Co-Operative Publishing Co. 1898.

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NO. 2.

THE PRESENT AND FUTURE OF THE LAW OF EVIDENCE.

SIR HENRY MAINE had occasion, thirty years ago, to make some special study of the English system of Evidence, in attempting to adapt it to the use of his countrymen in governing India. In letting his intelligence "play freely over the subject," he was led to remark that "the theory of judicial evidence is constantly misstated or misconceived even in this country [England], and the English law on the subject is too often described as being that which it is its chief distinction not to be, — that is, as an *Organon*, — as a sort of contrivance for the discovery of truth which English lawyers have patented." And after pointing out that their law of evidence grew out of the jury system, he adds truly that "the English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure."

And yet the system is very highly praised. Why then should it be so quickly abandoned when the jury is gone? If we should take too literally the indiscriminating statements of some writers, we might well wonder that so fine a thing should not always be used. A distinguished author tells us, at the end of a famous treatise: ¹ "The student will not fail to observe the symmetry and beauty of this branch of the law; . . . and will rise from the study

¹ Greenl., Evid., i. s. 584.

of its principles convinced, with Lord Erskine, that 'they are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life.'"

I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork, not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions in presiding over courts where ordinary, untrained citizens are acting as judges of fact. In any other aspect largely irrational, in this point of view it is full of good sense; — a good sense, indeed, that occasionally nods, that submits too often to a mistaken application of its precedents, that is often short-sighted and ill-instructed, and that needs to be taken in hand by the jurist, and illuminated, simplified, and invigorated by a reference to general principles.

As regards Erskine's often-quoted remark above quoted, quite too large and general a reach has been imputed to it. It was a part of the famous opening argument in *Hardy's Case*, in 1794, and had reference to the great advocate's unsuccessful contention against one of the most extraordinary, characteristic, and subsequently discredited results of English adjudication. His client was charged with the treason of compassing the King's death, and with the overt act of a conspiracy to depose him. Erskine had been inveighing bitterly against a doctrine which the court afterwards enforced against his client in its most uncompromising shape — the doctrine, namely, that in such a case proof of the conspiracy to depose was, in legal effect, proof of compassing the death, and not merely evidence of it; and this by virtue of an indisputable "presumption." "The conspiracy to depose the King," said Eyre, C. J., in his charge to the jury,¹ "is evidence of compassing and imagining the death of the King, conclusive in its nature, so conclusive that it is become a presumption of law, which is in truth nothing more than a necessary and violent presumption of fact, admitting of no contradiction." Such a doctrine, of course, while exhibiting itself in a dress of evidence and presumption, is, in reality, a very different matter; it is really a doctrine of the substantive law of treason; grounded, indeed, upon a conclusion of evidence, upon what is usually true in such cases, but none the

¹ 24 St. Trials, col. 1361.

less a doctrine which has now passed out of the sphere of evidence, and even out of the legitimate sphere of presumption, and has become an incontrovertible doctrine of the substantive criminal law. As against this hard, judicially legislated principle, Erskine had contended that the overt act was only a piece of evidence; that the intent to kill the King was to be proved to the jury by evidence which really convinced them beyond a reasonable doubt; that a conspiracy to depose might or might not, according to the circumstances of the particular case, suffice to prove the intent to kill; and that the jury must themselves be satisfied that it did. "My whole argument," he said, in substance, towards the end, "is only that the crime of compassing the King's death must be found by you, really *believed* by you, and beyond a reasonable doubt. You are to go upon the ordinary rules of evidence; not upon precedents coming down from evil times. The rules of evidence as they are settled by law and adopted in its general administration, are not to be overruled or tampered with. They are founded in the charities of religion," etc. Erskine was not engaged in any general estimate of the English law of evidence; he was pressing home a particular point, and condemning a certain contention as barbarous and inconsistent with those general principles which secured to a prisoner the free, unfettered exercise of the jury's judgment, instead of driving them to a verdict by an irresistible legal rule.

I have said that our law of evidence is ripe for the hand of the jurist. I do not mean for the hand of the codifier; it is not; but for a treatment which, beginning with a full historical examination of the subject, and continuing with a criticism of the cases, shall end with a restatement of the existing law, and with suggestions for the course of its future development. Such an undertaking, worthily executed, if it should commend itself to the bench, would need only a slight coöperation from the legislature to give to the law of evidence a consistency, simplicity, and capacity for growth which would make it a far worthier instrument of justice than it is.

Let us look at this part of our law, and consider (1) What, in fact, we have now; (2) What we should have, and how to get it.

I. We have now, as our law of evidence, in the form in which it is ordinarily stated, a set of rules of great volume and complexity, occupying, with the illustrations thought needful for their exposition, twelve hundred and thirty-four octavo pages in Taylor's last

(9th) edition of his work on Evidence,— a book which was originally an adaptation of Greenleaf's book, but was afterwards expanded, and now constitutes the chief English book on this subject. The few principles which underlie this elaborate mass of matter are clear, simple, and sound. But they have been run out into a great refinement of discrimination and exception, difficult to discover and apply, and have been overlaid by a vast body of rulings at *nisi prius*, and decisions *in banc*, impossible to harmonize or to fit into any consistent and worthy scheme. A great portion of these rules, as laid down by the courts and by our text writers, are working a sort of intellectual fraud by purporting to be what they are not. To the utter confusion of all orderly thinking, a court is frequently represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure. The rules are thus in a great degree ill-apprehended, ill-stated, ill-digested. Sometimes, as in the case of proving attested documents, they have come down out of practices and rules of mediæval procedure by a slow process of change that has concealed their pedigree and their real nature and basis; and then rules of this sort come to be applied or refused application merely according to their letter, or according to some false imagination of reasons, with grotesque results, and in a manner fanciful and unintelligent. Sometimes our rules have sprung from following on after some single specific ruling at *nisi prius*, wise, perhaps, in the particular case, but having in it no general element or principle which should make it a precedent; and sometimes, on the other hand, from dealing with such a ruling, as if it were only a narrow and particular precedent, failing to recognize its true character as illustrating a large principle of sense and convenience, fit to be spread into a general application. In part the precepts of evidence consist of many classes of exceptions to the main rules,— exceptions that are refined upon, discriminated, and run down into a nice and difficult attenuation of detail, so that the courts become lost, and forget that they are dealing with exceptions; or perhaps are at a loss to say whether the controlling principle is to be found in the exception or in the general rule; or whether the exception has not come to be erected into a rule by itself. In part our rules are a body of confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used, without perceiving that ideas, pertinent and just in their proper places, are being misconstrued and misapplied.

Let me, in part, illustrate what I mean. There is a great bulk of cases, constantly added to, which are referred to what is known as the "parol evidence rule." Generally speaking this rule, relating to documents of the solemn and formal kind, undertakes to secure to them their proper legal operation as against less formal extrinsic acts and utterances of the writer. "Parol contemporaneous evidence," we are told, "is inadmissible to contradict or vary the terms of a valid written instrument."¹ Now so crudely-conceived and so ill-digested is the mass of matter under this head, which every day and many times a day our courts are called on to interpret and apply, that, in reality, vastly the greater part of it, almost all of it, has no proper place in the law of evidence, being chiefly made up of rules in the substantive law of documents, such as wills and contracts, and of rules of construction and interpretation. What is the result of this? Utter confusion of thought, and frequent injustice in decision. Of course when men are, in reality, discussing a question in the law of partnership, agency, or bankruptcy; or the grounds and scope of equity jurisdiction in dealing with fraud, mistake, trusts, or the reforming of documents; or the rules for the construction and interpretation of language; and yet, out of an imagination that they are dealing with rules of evidence, go on to clothe their ideas in the phraseology of that subject; although a right result may be reached, it is not rightly reached, and bewilderment attends it. There is a question, let us say, of reforming a will by inserting words which are not in it; the decision is disguised by saying that parol evidence is not admissible for this purpose; whereas, if the purpose were legitimate the evidence would be good enough. There is a question of denying operative effect to a contract in writing which has been signed, is in the hands of the other party, and is in form complete; the question is, Have you a legal ground of action or defence in saying that it was not to go into effect till the happening of some event which has not happened, and was not named in the writing? This is called a question of admitting parol or extrinsic evidence. There is a question of whether you can set up the defence of mistake in a common-law action, or whether you must go into equity. That is called a question of admitting parol evidence. There is a question of whether an undisclosed principal can sue or be sued on a written contract signed only by his agent's

¹ Greenl., *Evid.*, i. s. 275, quoting *Phil. & Am. Evid.*

name; or whether you can avail yourself of an implied warranty when the contract of sale was in writing and says nothing of a warranty. These are called questions of whether parol evidence is admissible. And if the agreement be under seal, the doctrine that the seal of the agent cannot bind the principal, is disguised by saying that parol evidence is not admissible to make the principal responsible. There is a question, in case of a misdescription in a will, whether a given person may take; and this masquerades under the form of an inquiry whether parol evidence is admissible to correct the mistake.

This error is deeply ingrained in our cases; and it is a subtle one. But you cannot possibly deal thoroughly and scientifically with this part of our law until the error is cast out; until it is purged of that mass of substantive law, and of mere rules of procedure, and reason, and logic which overload it. There was a time when all that was said or read to the jury was spoken of as said *en evidence al jury*. The contrast in mind when this was said, was between saying something to the court, in pleading (in the days of oral pleading), and saying it to the jury. But now, for two or three centuries, we have been discussing the admissibility of what is offered in evidence, under a new branch of law, called the rules of evidence; as contrasted with its admissibility under the law of pleading and practice, and the substantive law. The old general question of admissibility has become specialized. If it was said, six centuries ago, that you could or could not say a thing *en evidence al jury*, it was because it was or was not matter to be said in pleading and entered on the record; or else because it was or was not logically relevant and material to the issue between the parties. Nowadays it may be excluded for the reason that, although relevant and material to the issue, and not at all matter of law, although properly addressed to the jury as contrasted with the court, yet it is excluded by this modern set of rules called the law of evidence. It is the characteristic of these rules to shut out what is relevant; not all that is relevant, — Heaven forbid! — but some things that are relevant, and notwithstanding they are relevant. There are many reasons for excluding what is offered in evidence, that have no relation to the law of evidence. If a thing be excluded because it is not within the scope of the general issue, it is excluded by the law of pleading; if, under the substantive law of the case, what is offered has nothing to do with the question, then it is the substantive law of the case that excludes; if what is offered has no logical

relation to the case, then it is the rule of reason that rejects it; or a party may be estopped from setting up what he offers evidence to prove. But when matter of fact bearing on the issue is excluded for none of these reasons, yet lawfully, it is the law of evidence that is working. As when the question is whether you may offer the sworn affidavit of a trustworthy eye-witness, not personally present in court, or a testator's extrinsic statement, when signing his will, that he meant one person rather than another of similar but not identical name; the exclusion in such cases is made by the rules of evidence; what is offered is relevant and material, but still is inadmissible.

It is then fundamental that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not. An innumerable company of questions, of the sort just alluded to, very often — more often than not, nay, much oftener than not — are dealt with in our text-books and cases as belonging to the law of evidence, when they ought to be carried to the border line of this subject and respectfully deposited on the other side. Most of the affirmative declarations in our books that evidence is admissible, belong to this class; and a very great proportion of those which hold it not admissible. As regards relevancy, in determining merely what is logically relevant to any point and what is relevant according to the standards of general experience, it is not the law that guides us; except, indeed, as it refers us to these universal standards, already known or ascertainable. For the law, being a human contrivance or outgrowth, and resting, as if by gravity, on human nature, human experience, and the principles that regulate human thought, takes all these things for granted. It does not undertake to re-enact them, still less to displace them, or to lift itself off this ground by its own boot-straps. To impute to it any such efforts is a suggestion as untrue historically, as these endeavors would be idle and superfluous in point of reason.

There is another great class of cases, germane to these just mentioned, but, unlike them, really belonging to the law of evidence, where the decision turns on the just application of certain large and inexact principles, — principles that may be likened to that which a jury has to apply in determining whether conduct in certain cases conforms to the standard of the prudent man. The law of evidence undoubtedly requires that evidence to a jury shall be

clearly relevant, and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not merely be remotely relevant, but proximately so. Again, it must not unnecessarily complicate the case, or too much tend to confuse, mislead, or tire the minds of that untrained tribunal, the jury, or to withdraw their attention too much from the real issues of the case. Now in the application of such standards as these, the chief appeal is made to sound judgment; to what our lawyers have called, for six or seven centuries at least, the discretion of the judge. Decisions on such subjects are not readily open to revision; and, when revised, they have to be judged of in a large way; this is expressed by saying that the question is whether the discretion has been abused, has been unreasonably exercised. Doubtless, in some classes of such cases, there may have grown up a sub-rule which limits the discretion. In such cases, since there is not an unfettered discretion, an ordinary additional question of law arises as to the application of this subsidiary rule. But, in general, the question of law is not an ordinary one, because it ties itself to an outside, non-legal standard; viz., that of good sense, common experience, the sound judgment of men of affairs. When, for example, on a question of negligence in driving a horse across a railroad, you offer evidence of a single instance where a third party drove safely over at another time, under like conditions; or, in another case, evidence of ten separate instances of doing this; and in both cases it is rejected; it is easy to see that a revising court might properly enough sustain both rejections, while themselves disapproving of both; — sustaining and yet disapproving of the first, because the evidence was slight and conjectural, and yet might be thought by a trial judge sufficiently relevant and helpful; and the second, because, while it seemed, in point of quality, fairly clear and strong and probative, it tended to confuse the case by its multiplication of instances, and because there were other simpler ways of proof open to the party, such as the opinion of experienced observers or a view by the judge or jury.

In such cases it is a question of where lies the balance of practical advantage. To discuss such questions, as is sometimes done, on the bare ground of relevancy, — even if we introduce the poor notion of legal relevancy, as contrasted with logical relevancy, — tends to obscure the nature of the inquiry. There is, in truth, generally, no rule of law to apply in answering such questions as whether the evidence, although probative, is too slight, conjectural,

or remote; or whether it will take too much time in the presenting of it, in view of other practicable ways of handling the case; or whether it will complicate and confuse the case too much. There is no rule and no principle which forbids delay, tediousness, and complication, pure and simple, and always; what is forbidden is unnecessary complication, delay, and tediousness. These things are discouraged; but often they are unavoidable. When the nature of the issue requires it, enormous dangers of this sort have to be run. Consider the Tichborne case, the Tilton *v.* Beecher case, the Guiteau case, and the great will case of Wright *v.* Tatham which turned up so often in the English books sixty years ago; or consider any hard-fought case raising the question of insanity. In such controversies a range of inquiry is allowed of almost indefinite width, one which covers the behavior of a party during his whole life, and even travels over into that of all his near relations.

In this region of the law of evidence much confusion results from an inexact apprehension of the nature of the questions, and of the appropriate method of handling them on appeal. Often it is not perceived that what appears to be a mistaken determination of such points at the trial, is simply a more or less important mistake in practical judgment, and not at all a mistake in law. Judges, and whole benches of them, may decide such questions differently, while perfectly agreeing on the rule of law.

There is a great head of the law of evidence, comprising, indeed, with its exceptions, much the largest part of all that truly belongs there, forbidding the introduction of hearsay. The true historical nature of this rule is hinted by the remark of an English court, two centuries ago and over, when it checked the attempt of a woman to testify what another woman had told her. "The court," it was quietly remarked, "are of opinion that it will be proper for Wells to give her own evidence." That is to say, the objection went to the medium of communication; witnesses before the jury, in giving ordinary testimony, had by that time been allowed for some three centuries; but it must be *un oyant et veyant*, a hearer and seer, as they said in the older Year Books; one who could say as the witnesses to courts in older times always had to say, *quod vidi et audiui*; it must not be testimony at second hand. When juries, who were originally themselves witnesses as well as triers, came to be helped regularly by the testimony of other witnesses, it was only by such as personally knew the truth of what they were saying, and not by

witnesses who only knew what some one else had said to them. Juries, indeed, could say what they "knew;" but witnesses to juries could only say what they had seen and heard. In the first half of the fourteenth century the judges laid this down as applicable to attesting witnesses. What it meant was that while juries could form opinions from anything they knew, the verdict being given at their peril, while they might act on what they had picked up in any way, and might form a judgment upon such foundations which would count as knowledge, — witnesses could not do this, or rather were not to state it if they did, were not to say what they "thought," or "believed," or had heard from others, or concluded from what we now call circumstantial evidence. This contrast between the function of the jury and that of witnesses, which made it necessary to discriminate and define these points five or six hundred years ago, as regards the preappointed witnesses who went out with the jury, — even before witnesses were ordinarily allowed to testify to juries, — has led to a steady and rigid adherence to the general doctrine of hearsay prohibition.

But there came a large and miscellaneous number of so-called "exceptions." Some of these were really quite independent rules, whose operation was rather that of qualifications and abatements to the generality of this other doctrine, — rules which were coëval with the doctrine itself or much older. For example, it seems always to have been true, in cases of homicide, that the dying declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202,¹ and used in evidence to the jury in 1721.² Such declarations in early times, and even in late times, had a peculiar credit allowed them. So in tracing pedigree the family hearsay seems always to have been resorted to. This matter, before jury trial was developed, used to be tried by witnesses,³ who stated circumstantially how they knew what they said; and hearsay from the family, if confirmed by circumstances, was, probably, always a basis for their testimony. Family hearsay had the aspect of family reputation; and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony

¹ 1 Seld. Soc. 11; and see, what looks to be about a quarter of a century later, another case in Pl. Ab. 104.

² *R. v. Trantor*, 1 Strange, 499.

³ Thayer, *Preliminary Treatise on Evidence*, 19-21.

the fact of the mother's recording the age in the records of a Priory, which record he had seen.¹ In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging in the given community was always regarded as good.

There was another special class of unsworn statements which had always been resorted to in judicial proceedings and admitted to the jury, viz. written ones, — entries in registers, in a parson's books, in the account books of stewards, in a merchant's books, in contracts, deeds, wills, and other documents. It is not true, so far as I know, that a mere testimonial writing not under seal, which purported to state only what another person had said to the writer, would ever have been received, any more than an oral statement of the same kind; but documents had been regularly shown to juries always, long before witnesses were received to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case, without even thinking of how the writer knew what he said. As regards ancient matters, writings very imperfectly authenticated were one of the chief sources of information, and often the only one. It appears, then, that a number of the so-called "exceptions" to the hearsay prohibition came in under the head of written entries or declarations; they came in, or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them. Such things, continuing at the present day, are, *e. g.*, the admission of old entries and writings in proof of ancient matters, written declarations of persons deceased against interest, and in the course of duty or business; and, to a limited extent, a merchant's own account books to prove his own case, — a thing clearly recognized as customary and allowable in an English statute of 1609, nearly three centuries ago, but insensibly, and often ignorantly, much qualified afterwards. So also of regular entries in public books, a matter probably never even doubted to be admissible in evidence.

In addition to all these ancient and always approved practices in their simple, original shape, operating as qualifications of the hearsay prohibition, there have come in many extensions of these; as when oral declarations of deceased persons against interest were received, and, in England, even oral declarations of deceased persons in the

¹ Pl. Ab. 293, col. 1.

course of duty or business. And not only has the scope of these old titles been enlarged, but new exceptions have been added; or perhaps they are rather old ones coming to be recognized and formulated; such as those relating to the *res gesta*, *i. e.*, declarations which make a part of some fact which is itself admissible, and declarations of present intention or present physical sensation. Such things are the natural development of the subject.

Now a great deal of perplexity exists, in the law relating to hearsay, from a failure to understand the scope of these exceptions; and from an uncertainty whether and how far they are to be freely developed, or to be strictly limited, as being mere exceptions, while the main rule itself which prohibits hearsay is freely developed. Sometimes one thing is done and sometimes the other. For example, in a leading case in the House of Lords, in 1880,¹ Lord Blackburn, in discussing a question of hearsay and rejecting the evidence, said: "I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible." On the other hand, Sir George Jessel, in a very different tone, in 1876,² had declared it to be the court's duty to extend the exceptions to the hearsay rule, out of "regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases." It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, *viz.*, that whatsoever is relevant is admissible. To any such main rule there would, of course, be various exceptions; but as in the case of other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course. One mischief, about the present state of our law is that it shows a spasmodic and half-recognized acceptance of such a theory in particular instances,

¹ *Sturla v. Freccia*, 5 App. Cas. 623.

² *Sugden v. St. Leonards*, 1 Prob. Div. 154.

while rejecting it generally. For example, there is, sometimes, a tendency to regard a hearsay statement as admissible if it be one of a set of facts giving and reflecting credit, each to the other, — on the principle of what is called circumstantial evidence. This brings in confusion, for our law really goes but a very little way in that direction. No doubt, in point of reason, hearsay statements often derive much credit from the circumstances under which they are made; say, *e. g.*, from the fact of being made under oath, or under impressive conditions, as being against interest, or made under strong inducements to say the contrary, or as part of a series of statements, or a class of them, which are usually careful and accurate, and the like; credit amply enough in point of reason to entitle them to be received as evidence, when once the absence of the perceiving witness is accounted for; and it would in reason have been quite possible to shape our law in the form that hearsay was admissible, as secondary evidence, whenever the circumstances of the case alone were enough to entitle it to credit, irrespective of any credit reposed in the speaker. This point of view is forever suggesting itself in that part of the subject relating to declarations which are a part of some admissible fact, — of the *res gesta*, as the phrase is. They are often here spoken of as parts of a mass of circumstantial facts, supporting and supported by each other in their tendency to prove some principal fact; instead of being regarded, as they should be, as parts of that fact itself, *pars rei gesta*, lying under the curse of hearsay, but received, by way of exception, on account of this special intimacy of connection with the admissible fact. This part of the subject presents an instructive spectacle of confusion resulting from the desire, on the one hand, to hold to the just historical theory of our cases; and, on the other, to resort to first principles, without being aware of the size and complexity of the task which is thus unconsciously entered upon.

I need not linger long on the two or three other chief topics in the law of evidence. The rules, roughly thus intimated, which forbid the giving of opinion evidence and of character evidence are leading and important. As to the former it is traceable easily to the same source as the hearsay rule. It was for the jury to form opinions, and draw inferences and conclusions, and not for the witness. He was merely to bring in to the jury, or the judge, the raw material of fact, on which their minds were to work. If the witness spoke directly to the very fact in issue, the jury were to

consider whether to believe his statements or not; if to other facts, of an evidential sort, then the jury were to judge of their import and their tendency. The witness was not to say that he "thought" or "believed" so and so; it was for the jury to state what they thought and believed. The witness must say what he had "seen and heard;" he was an "*oyant et voyant*." But then, simple as all this sounds, the distinction could not serve in many nice and critical inquiries. In the loose and easy administration of the law of trials that existed as long as juries went on their own knowledge, and needed no witnesses or evidence at all, and at a time when, even if they had witnesses, they were at liberty to disregard them and to follow their own personal information, it was possible to get along without nice discriminations; so that the law of evidence had hardly any development at all until within the last two centuries; and it was but slight before the present century. In a sense all testimony to matter of fact is opinion evidence; *i. e.*, it is a conclusion formed from certain phenomena and certain mental impressions. Yet that is not the way we talk in courts or in common life. Where shall the line be drawn? When does matter of fact first become matter of opinion? A difficult question. But some things are clear. There are questions which require special training and knowledge to answer them. A jury, unless it be one of experts, and, as such, ill adapted, perhaps, for the general purposes of trials, cannot deal with them. On such questions, then, the ordinary jury may be assisted by skilled witnesses, who give their opinions. There are other questions, not requiring skill or training, but only special opportunities of observation, like handwriting, and the value of property, on which opinions of ordinary witnesses having such opportunities may be given. How far does this go? There is much apparent perplexity in the cases. In a very great degree it results from differences of practical judgment in applying an admitted rule, — the admitted rule being that opinion evidence is not generally receivable, and the difference arising from differing judgments as to what is and is not really to be called opinion evidence in the sense of the rule. It has been said, judicially, that "there is, in truth, no general rule requiring the rejection of opinions as evidence."¹ Without acceding quite literally to that, there is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it

¹ Hardy v. Merrill, 56 N. H. 227, 241.

will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule. It is obvious that such a principle must allow a very great range of permissible difference in judgment; and that conclusions of that character ought not, usually, to be regarded as subject to review by higher courts. Unluckily the matter is often treated with much too heavy a hand by the courts, and the quantity of decisions on the subject is most unreasonably swollen.

The rule excluding character evidence, when exactly stated, merely forbids the use of a person's general reputation, or of his actual character, as the basis of an inference to his own conduct. This rule is modern. In earlier times such evidence was freely used in our courts, as it still is in other than English-speaking countries. Undoubtedly, as a mere matter of reason, it often affords a good basis of inference; and, on the other hand, often, besides tending to subject a man to the operation of prejudice and malice, it is quite too conjectural and too slight to be safely used, and so comes within the condemnation of a general principle already mentioned.

On the rules regulating the examination of witnesses I will not dwell. They are full of practical sense, and are few, simple, and easily understood; although, like all rules for strenuous competitive struggles, nothing but practice and the observation of practice can bring them to a man's fingers' ends, or keep them there. Fortunately they allow much more discretion to the judges in administering them than is found in most of the rules of evidence. As to rules for the exclusion of witnesses, they have nearly disappeared. Little remains except what reason requires, viz., the exclusion of persons who are too young to be trusted, or too deficient in intelligence.

Finally, there are rules relating to documents, — as to the proof of their contents, of their execution, and of alterations in them. Of these a word or two should be said. He who would prove the contents of a writing must produce it bodily to the tribunal; and if it is lost or destroyed, otherwise than by evil contrivance of the party offering the evidence, then the contents may be proved by copy or orally. This rule, if wisely applied, is one of peculiar good sense, but there is discordance as to the scope of it, and as to what may excuse one from the application of it. It is obscurely connected with the old law of *profert*, which required the physical production in court, in the course of pleading, of any document which was the basis of action or defence.

As regards the proof of execution, where the document is attested, the rule runs back to the most ancient periods of our law. The document witnesses were formerly summoned with the jury, and joined in their secret deliberations.¹ This was done until about four centuries ago, and perhaps later. From these older periods there survived a rigor of requirement as to summoning the attesting witnesses, and a precedence in that method of proving the execution over all others, which have long been irrational; the law is still encumbered with many troublesome remnants of the old doctrine and many ill-instructed decisions.

As regards the proof of alterations in documents the cases are full of confusion. Fragments of substantive law embarrass the rules of evidence relating to this subject; and it is further intolerably perplexed by the introduction of a quantity of jargon about presumptions and the burden of proof, which often conceals the lack of any clear apprehension of the subject on the part of those who use it, and often disguises the true character of sound decisions.

Such is a rough outline of the chief characteristics of our law of evidence. Speaking exactly, this part of the law deals merely with the business of furnishing to the tribunal such information as to matters of fact in issue as is needed in order to decide the dispute, or to make any desired order. It assumes a properly qualified tribunal, one that knows an evidential thing when it sees it. It does not re-enact, nor does it displace, the main rules which govern human thought. These are all taken for granted. But it does exclude, by rules, much which is logically probative. It also regulates the production of witnesses, and documents, and visible objects offered for inspection as the basis of inference.

The chief defects in this body of law, as it now stands, are that motley and indiscriminated character of its contents which has been already commented on; the ambiguity of its terminology; the multiplicity and rigor of its rules and its exceptions to rules; the difficulty of grasping these and of perceiving their true place and relation in the system; and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern systems of evidence, or to those checks and qualifications of these principles which have

¹ Thayer, Prelim. Treatise on Ev. 97.

grown out of the machinery through which our system is applied, viz., the jury. These defects discourage and make difficult any thorough and scientific knowledge of our system and its peculiarities. Strange to say such a knowledge is very unusual, even among our judges.

The actual administration of this system is, indeed, often marked by extraordinary sagacity and good sense, particularly in England. In that country it is uncommon to carry questions of evidence to the upper courts. In England the influence of the judge at *nisi prius* goes to check controversy over points of evidence far more than here, and the relations between bench and bar are such that this influence is generally effectual.¹ Moreover, owing to that great and just confidence in the capacity of the judges which is felt in England, they are able to exercise a beneficent control over the subject through their extensive power of making rules.²

In our own administration of the law of evidence too many abuses are allowed, and the power of the courts is far too little exercised in controlling the eager lawyer in his endeavors to press to an extreme the application of the rules. Sharply and technically used, these rules enable a man to go far in worrying an inexperienced or ill-prepared adversary, and in supporting a worthless case. Our practice, which shows so little of the sensible moderation of the English barrister, and so little of the vigorous control of the English judge, in handling evidence at the trial, operates in another way to injure the rules of evidence. Questions of this sort are generally taken up on exceptions, a procedure, never common in England and now abolished there, which presents only a dry question of law, — not leaving to the upper court that power to heed the general justice of the case, which the more elastic procedure of the English courts so commonly allows ; and tending thus to foster delay and chicanery.

In neither country is the system of evidence consistently admin-

¹ It surprises English lawyers to see our lively quarrels over points of evidence. One of them writing from New York to the "London Times," some years ago, spoke of being present at the trial of a case of trespass to land between two farmers. It involved questions of old boundaries. "The nature of the case," he said, "made it inevitable that many questions of evidence should be raised. But never, not even in a pedigree case, or an indictment for not repairing a road, did I see so many objections to the reception of evidence taken ; and I am inclined to think that points of evidence are discussed far more frequently than is now the case with us." The observation of any one who has watched trials in the English courts will emphatically confirm these impressions.

² See Wilson's *Judicature Acts*, 7th ed. (1888), *passim* ; and see comments in *HARVARD LAW REVIEW*. viii. 224, on Order XXX., Rule 7, promulgated in August, 1894.

istered. Wherever evidence is taken by commission or deposition, in this country at least, the rules of exclusion largely break down; that is to say, in a great proportion of trials where there is no jury, viz., in equity, patent, and admiralty cases, and, more or less, in jury cases at the common law. In such cases the magistrate who takes the evidence notes any objection that is made, but does not and cannot omit to set down the evidence actually given. There it stands, and it is handed up to the court or jury, and is found on the paper with all the rest of the evidence. In most instances there is small profit in fighting over the admissibility of evidence which is already in, and has once been read by or to the tribunal; under such circumstances the whole doctrine of the exclusion of evidence is in a great degree inoperative.

II. So much for the system of evidence which we have. Let me come to the second question: What should we have, and how may we get it?

We should have a system of evidence of a character simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied. All this is necessary, because it is for use in the midst of the eager competition of trials, where time is short and decisions must be quickly made. Long discussion, and delay for reflection, are impracticable; and in a secondary and incidental part of the law, like evidence, however important it be, — and it is very important, for the putting in or keeping out of evidence means often the difference between gaining your case or losing it, — decisions in the lower court should generally be final.

In the pressure of actual trials, where, often, the interests and passions of men are deeply stirred, and all the resources of chicane are called into play and directed by great abilities to obstruct the movements of justice, — the rules of evidence and procedure ought to be in a shape to second promptly the authority of the courts in checking these familiar efforts. In the rulings of judges at the trial much depends on momentary and fleeting considerations, addressed to the practical sense and discretion of the court, and not well admitting of revision on appeal. There are many things in which even now the discretion of the courts goes far. A thousand important matters, of one sort and another, are finally disposed of at the trial, — without the right of appeal. The all-important decision of the jury itself is final, except as the court, for a few rea-

sons, may set it aside, *e. g.*, as being irrational or against evidence. In like manner, on the whole of the secondary and adjective part of the law, there should be little opportunity to go back upon the rulings of the trial judge; there should be an abuse, in order to justify a review of them by an appellate court. In order to make this practicable, the rules of evidence should be simplified; and should take on the general character of principles to guide the sound judgment of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it. And then, as regards the mass of detailed rules, these should mainly be subject at all times to the shaping and controlling power of the supreme courts, in the different jurisdictions, in making their rules of court. The rules of evidence on which we practise to-day have, in fact, mostly grown up at the hands of the judges; and, except as they be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped.

But, in doing this, let me hasten to say, it would be necessary at the outset to discriminate between what are really rules of evidence, and what are only nominally such. It would never do to submit to the control of the judges, through rules of court, the great mass of substantive law that now lies disguised under the name of the law of evidence. It is, indeed, on every ground, high time that this separation were made. It is discreditable to a learned profession to allow the subject to lie in the jumble that now characterizes it in this respect. To do this will tend wonderfully to simplify and clear the subject of evidence as we now have it, and it will also remove a chief objection to certain needed reforms, and especially to this of placing in the hands of the judges a far larger discretion in shaping and modifying the system than is now allowed them. This, then, is the first step to be taken; it is necessary in any event; and it is practicable, if undertaken by competent hands.

When once this extrusion of foreign matter is accomplished, the process of simplifying and restating the rules of evidence, in the proper sense of the word, can go forward. To accomplish this, some legislation would probably be necessary; it should take the shape of conferring authority on the courts, or expressly recognizing it as already rightfully in them, to change and mould the

rules of evidence, subject to such limitations as may seem prudent, — subject only, it might be hoped, to a few large and simple principles which are the skeleton of our present system. We can hardly hope for wisdom enough in the legislature to accomplish in any other way what is needed. Good legislation of any sort, in the way of law reform, is very hard, almost impossible, to get. Yet a small and instructed body of lawyers, in any legislature, can overcome even this difficulty; and such a body, in any community, might well hope to carry through so reasonable a provision as that of charging the courts with a general control over the rules of evidence, when once they themselves were persuaded of the need of it. But I do not forget that, on such subjects as this, the lawyers are often the persons chiefly needing to be roused and convinced, and that this is the greatest obstacle to be overcome. This was strongly put two years ago by a leading member of the bar.¹ In recommending to a body of young lawyers as their special work, “for all their lives,” — aside from the necessary work of their immediate calling, — the great business of “the amendment of the law,” using the words in a large sense, the distinguished speaker recognized the fact “that no class in modern society is more conservative, more timid in promoting, more resolute in resisting, alterations in existing law, than the body of which we are members.” And after alluding to other possible reasons for what he calls “the dull conservatism of many lawyers,” he adds that “there is a timidity borne of mere ignorance. . . . And so it is the narrowness of vision, the imperfect intelligence of many lawyers which makes them . . . apprehensive of changes which they think untried experiments.” These excellent suggestions point to the chief difficulty in accomplishing such a change as I am proposing, so far as it is dependent on legislation. Yet, as I said, a few enlightened and resolute lawyers, men of recognized legal capacity and character, could, with good fortune, carry through any of our legislatures some such prudent measure of reform as I am suggesting. In Massachusetts we have had a typical illustration of what a well-trained lawyer may do for his profession in the way of law reform, by the simplest methods. Nearly fifty years ago Mr. B. R. Curtis, who, two years later, in 1851, became Mr. Justice Curtis of the Supreme Court of the United States, being a member of the Massachusetts House of Representatives, introduced a resolution for the appointment of three commissioners “to revise and

¹ Address by Hon. Theodore Bacon, before the Graduating Class of the Yale Law School, in 1896.

reform the proceedings in the courts of justice in this Commonwealth, except in criminal cases, subject to the approval of the legislature." It was unanimously adopted, and Mr. Curtis, with two other leading lawyers of the State, was appointed for the task. In 1851 they prepared the draft of what has been since known as the "Practice Act." The commission proceeded cautiously, in some respects too cautiously, and consulted the bench and bar freely; their measure was accompanied by an admirable report of some twenty octavo pages, understood to have been prepared by Judge Curtis, which has still the merits of a legal classic, giving the reasons for their action. The bill was but slightly changed by the legislative committees to whom it was referred; and it passed without dissent. It was a careful but radical change of the whole civil procedure of the State at common law. A few changes were made in 1852 by a repeal and re-enactment, but they left the law substantially the same, and Massachusetts has lived under it with success and great satisfaction ever since, making only occasional improvements. In Connecticut, in 1879, similar reforms were accomplished under the leadership of a distinguished lawyer, now a member of the Supreme Court of that State;¹ and other instances might be cited in other States of our country. In England everybody knows of the great measures, under the general title of the Judicature Acts, which have been carried through in the last quarter of a century, under the impulse of Lord Selborne.

But even without legislation, the judges have great power over the subject, direct as well as indirect. A system which mainly came into life at their hands and has been constantly moulded by them, by way of administering procedure, they can also largely reshape and recast, if they will. But no court should enter upon this task that is not sure of its ground, that does not pretty well understand the history, nature, and scope of the existing rules, and see pretty clearly where it means to come out. With these preparations, however, the course taken from time to time by the English judges is, in a good degree, open to ours. By using strongly their power to shape the procedure and modify it by rules of court, they can, directly, do much; and by discouraging an unjust and overstrained application of the rules of evidence, by construing them freely and in a large way, by refusing to interfere with the rulings of the lower courts except in cases of abuse or of clear and important error, by

¹ Hon. Simeon E. Baldwin.

encouraging a more elastic procedure in shaping questions for the upper court, by recurring always to fundamental principles, and inclining always to give effect to these as against exceptional and special rules, and generally by recognizing, resolutely and persistently, the subordinate, auxiliary, secondary, wholly incidental character and aim of the rules of evidence (properly so-called), they can indirectly do a very great deal. Let me, however, again and again repeat, and with emphasis, that I mean, in speaking of the secondary character of the rules of evidence, to refer only to rules of evidence properly so called; and let me again and again insist that the body of rules now called by that name should, without needless delay, be purged of that spurious matter, and relieved of that great mass of material, *rudis indigestaque moles*, belonging to the substantive law, to the general rules of legal reasoning, and to other parts of the law of procedure, of which I have repeatedly spoken.

What about the jury? some one may ask. If our present system of evidence has been called out by the jury, and we still have that, why must not the law of evidence continue? Well, that suggests the question, whether the jury itself must continue? The jury system is already much modified. The experience of England, Massachusetts, and some other States, where for some years past in most civil cases, no person has a jury trial unless he asks for it before a certain time, has been satisfactory. This has worked a great cutting down in the number of jury trials. It appears to me that, with or without the aid of changes in constitutional provisions, more may well be done in reducing the number of jury trials in civil cases; and that in criminal cases, more may be done than now in the same direction. Personally I should think that it was not wise to abolish jury trial in civil cases, — of course not in criminal cases, — but only that it should be restricted still farther. Indeed I would restrict it narrowly, for it appears to me, among other things, to be a potent cause of demoralization to the bar. In so far as it has been or may be restricted, the objections to any changes in our system of evidence which are founded on its relation to jury trial are lessened.

But apart from all that, it may be said, truly, that juries are now much less helped and restrained by the judicial contrivances which find expression in our rules of evidence than is sometimes thought. Judges, to a large extent, sit quiet and let parties try their cases with as loose an application of the rules of evidence as they themselves may wish. Indeed, this has been judicially declared to be

the right of litigating parties in all cases. "As the rules of evidence," said Chief Justice Shaw, in 1848,¹ "are made for the security and benefit of parties, all exceptions may be waived by mutual consent." Allowing that this is overstated, it may still be insisted that the old conceptions of a jury's incapacity, and of the need of so much exclusion, were overstrained, and that they are largely inapplicable to modern juries.

But I will leave aside any question of changing the jury system, and assume that it is to be in no degree restricted. Undoubtedly, at least in my opinion, it will long continue, and should continue, to a greater or less extent. So long as it does, we must have a law of evidence, *i. e.*, a set of regulative and excluding precepts, enforced by the presiding officer of the meeting, *viz.*, the judge. In exercising this function the court must continue to apply certain great principles, such as these: (1) That the jury must, so far as possible, personally see and hear those whose statements of fact, oral or written, they are asked to believe; (2) that witnesses must, so far as possible, testify orally, publicly, under strong sanctions for truth-telling, and that both parties should have full opportunity to examine or cross-examine under the court's supervision; (3) that in the case of writings the jury must, so far as possible, personally and publicly inspect such as they are expected to act upon; (4) that whatever is said or shown to the jury, or privately known to them, bearing on the case, must be said, shown, or stated publicly, in presence of the court and of all parties concerned; (5) that the execution of solemn documents must be clearly shown, and that they must be faithfully construed according to the written terms; (6) that the jury should not be obliged or permitted to listen to what will unnecessarily delay the case, or too much tend to confuse or mislead them; (7) that the jury should be aided by the opinions, on matters of fact, of persons specially qualified, wherever they are likely to be materially helped by it; (8) that the court should have power to review and set aside the verdict of the jury, in order to prevent gross injustice, and secure conformity to the rules of law and the requirements of sound reason, but in no case substituting their own judgment for that of the jury, and always exercising a merely restraining power.

If a few comprehensive, fundamental principles like these, derived from experience and at the bottom of our present system, be followed, construed, and applied in a liberal way, and the application

¹ Shaw *v.* Stone, 1 Cush. 228, 243.

of them be kept steadily under the oversight and control of the court, by being dealt with as rules of court, it appears to me that our system of evidence might be vastly improved, and be made conformable to the changing convenience of mankind.

And now, finally, if it be said that we have not judges fit for the large discretion thus to be confided to them, several things may be said in answer: —

1. That sort of remark about our judges is often made when one has in mind, not the judges of his own courts, or of any courts that he knows most about, but some other judges in some other parts of the country. Admitting that the statement may be true in some places, it is not true of the higher Federal courts anywhere, or of the higher courts in several of our States. It is not true in England. Wherever it is not true, that particular jurisdiction need not be deterred from giving to its highest courts the proposed recognition and enlargement of discretionary power. And the example thus afforded will be likely to help matters elsewhere.

2. If the judges in any place are not fit for any given functions which those in other places exercise with benefit to the community, or which it is thought well to put upon them, that is a reason for changing the breed of judges. And we may remember that, in most of our States, a change, whether for better or worse, is only too quickly and easily possible.

3. The objection, however, may have another answer. Those who make it, forget, for the moment, how much discretion is already reposed in our judges, and exercised by them at every hour of the day and in every part of their functions. In imposing criminal sentences, in punishing contempts, in passing upon motions, in making rules of court and regulating practice and procedure,¹ in adopting rules of presumption, in determining the limits of judicial notice, in applying the rules of evidence, and in conducting trials generally, — in discharging these and other duties, a vast discretionary power is everywhere exercised. Men who can safely be intrusted with the discretion which the ordinary exercise of the judicial office imports, every day of the week, are fit to undertake the function that I am now suggesting.

James B. Thayer.

CAMBRIDGE.

¹ See, for example, as I am reminded by my colleague, Professor Smith, the experience in New Hampshire during the administrations of Chief Justice Bell and Chief Justice Doe.

MANDATORY INJUNCTIONS.¹

IN the whole range of English and American remedial jurisprudence there is no subject which illustrates and demonstrates more strikingly than the equitable remedy of injunction the evolutionary principles which are incessantly at work in the development of the law. Equity itself, now a splendid and orderly system of remedies, was born of necessity, and underwent a constant, and sometimes an unequal, struggle for existence and supremacy during the past two hundred and fifty years. The legal remedies were unyielding in their forms, and because of their unyielding forms were inapplicable in an ever-enlarging class of cases where rights were to be preserved, duties and obligations enforced, and wrongs and injustice prevented. Where the legal remedies were inadequate, incomplete, or wholly wanting, there equity gradually began to exert itself in the application of new remedies, so that wrong and injustice might not prevail over right and justice for the lack of an efficient remedy.

It is to be regarded as one of the glories of our English and American law that this evolution and development, this reaching out after more ample and complete remedies, this working together of vital forces towards a more and more perfect and harmonious system of remedial justice, is still going on; and that no one having a just cause need fear that he must suffer or endure a wrong for the want of a sufficient remedy.

"It is the duty of a court of equity," said Lord Cottenham, in *Taylor v. Salmon*² (and the same is true of all courts and institutions), "to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily made in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

¹ This paper was read by Judge Klein at the meeting of the Missouri Bar Association in Kansas City, Mo., March 30, 1898. — ED.

² (1838) 4 Mylne & Cr. 134.

This is the view constantly acted on, although not often expressed. But when the courts are pressed upon the subject they respond in unmistakable terms. These tendencies are well illustrated, and the true spirit of equity jurisprudence breathes, in the opinion delivered by Judge Ross of the United States Circuit Court of Appeals, Ninth Circuit, in the case of Northern Pacific R. R. Co. *v.* Hussey.¹ In that case the plaintiff, under an act of Congress, was entitled to every odd section of certain lands on each side of its railroad line, the lands to be surveyed by the United States. Before this survey was made, and before, therefore, the railroad company could know which particular sections of land it would be entitled to, the defendant, a mere trespasser, entered upon the lands and cut timber therefrom in such manner that the denuded portions would fall within the odd as well as the even sections when the survey would be made. And he was continuing these acts of trespass when the plaintiff sought an injunction to restrain these acts, which was denied by the court below.

The lands in question were valuable alone for the timber that grew upon them, and to cut down, destroy, or carry away the timber thereon was, therefore, essentially to destroy and take away the very substance of the estate. Here the plaintiff had no title to particular lands, and therefore could not maintain any action for damages for the asportation of any particular tree or trees. "The case," said the court, "is a novel one, it must be admitted; but when so great a wrong is being perpetrated, as must be taken to be true for the purposes of the present decision (a demurrer to the bill had been sustained below), and the party seeking to prevent the wrong has no adequate remedy at law, equity, we think, will afford the remedy. '*Ubi jus ibi remedium*' is the maxim which forms the root of all equitable decisions." He then quoted with approval the language of Ricks, District Judge, in Toledo, etc. Ry. Co. *v.* Pennsylvania Co.,² in which a mandatory preliminary injunction had been granted, and certain parties were before the court on a motion to punish them for contempt in violating the orders which had been made: "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time without a precedent. If

¹ (1894) 61 Fed. Rep. 231.

² (1893) 54 Fed. Rep. 746, 751.

based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome to the Chancellor to meet the constantly varying demands for equitable relief."

The duty of a court of equity to devise new remedies and to extend its aid to meet new emergencies is recognized also in *Joy v. St. Louis*,¹ in these words: "It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.

And Mr. Justice Brewer is quoted by Judge Ricks as saying, "I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex relations and the protection of rights can demand."²

It is not intended in this paper to deal with the remedy of injunction generally. Every lawyer is often called upon to invoke that remedy, and early in his practice becomes acquainted with the general principles controlling its application and ultimate efficiency. We are to deal here with the most efficient of all forms of injunctions, viz.: —

MANDATORY INJUNCTIONS.

A mandatory injunction is one that commands a party, plaintiff or defendant, to perform a certain act or acts. It is singular that while courts of equity have frequently granted this particular remedy, they seem, nevertheless, to have stood, at all times, in a sort of dread respecting it, and to have viewed it with a kind of prejudice; so much indeed that we find it stated by eminent judges, as we shall see, that a temporary injunction in mandatory form is not to be granted at all.

The form adopted at an early day for injunctions of this sort was negative instead of positive. It restrained the defendant from permitting a condition of affairs which he had wrongfully brought about, occasioned or suffered to exist, from continuing any longer; and this compelled him to do the acts necessary to bring about a discontinuance of the wrongful state of things produced by him,

¹ (1890) 138 U. S. 1, 50.

² See 54 Fed. Rep. 751.

under the fear of attachment, sequestration of property, or other punishment for disobedience. But no good reason exists for this roundabout, hesitating method of procedure. What the law declares to be just and proper to be done, the courts should require to be done in a positive and direct, as well as an effectual manner. This view of the matter has been forcibly presented by Sir George Jessel, Master of the Rolls, a very learned and eminent equity judge in a case requiring a mandatory injunction. "As to mandatory injunctions," said that eminent jurist, "their history is a curious one, and may account for some of the expressions used by the judges in some of the cases cited. At one time it was supposed that the court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution. Every judge ought to exercise care, and it is not more needed in one case than in another.

"In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the court never has any hesitation in enjoining him. What difference could it make, if instead of fouling it day by day, he stopped it altogether? In granting a mandatory injunction the court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the persons injured, the court said, as in cases of specific performance, 'We will put you in the same position as before the injury was done.' When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it, before the bill was filed? It could make no difference, where the plaintiff's right remained and had not been lost by delay or acquiescence." Finding the case under consideration a proper one for a mandatory injunction, he suited his action to his words and granted the order in accordance with the prayer, requiring the

defendant to take down and remove a building which interfered with the access of light and air to the plaintiff's home, as he was entitled to enjoy the same.¹

It is quite common to say that a mandatory injunction is very seldom granted upon an interlocutory application or before final decree. Indeed, so careful and learned a jurist as Judge Sharswood stated in one case² that "the authorities, both in England and in this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory." In support of this broad statement he cites the case of *Gale v. Abbott*,³ where Vice-Chancellor Kindersley said: "It was useless to come for what was called a mandatory injunction on an interlocutory application. Such an application was one of the rarest cases that occurred, for the court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing."

Let us suppose for a moment that this is the real condition of our remedial justice, what grave mischiefs would a plaintiff have to suffer at the hands of an unscrupulous defendant who had the temerity to accomplish a destruction of the plaintiff's right before he had an opportunity of applying to the court for its protection? A case well illustrating the serious consequences that would follow from such a view recently occurred in the Circuit Court of the city of St. Louis, where a mandatory temporary injunction was applied for under these circumstances.⁴ The plaintiff was, and for many years had been, the owner of a considerable tract of land in the northwestern part of the city. Upon this he had his residence, a costly structure, and the usual outhouses. Near the dwelling he had his gardens, and in the midst of these there was a natural sheet of water covering, perhaps, two or three acres of his land. This sheet of water had existed time out of mind, and was an attractive feature of the plaintiff's homestead. It was fed by springs of pure water, as well as by the surface water of the plaintiff's land; but it had never been known to overflow its banks. Leading from this sheet of water there had always been a well-defined natural water-course, which carried off the surplus water from the little lake, and kept it at a uniform level. This condition of things had always existed, and the plaintiff's residence, outhouses, and gardens had

¹ *Smith v. Smith* (1875), L. R. 20 Eq. 500.

² *Audenried v. Phila. & Reading R. R. Co.* (1871), 68 Pa. St. 370, 375, 376.

³ (1862) 8 Jurist, N. S. 987.

⁴ *Filley v. Bambrick* (1895), No. 92,462, Circuit Court, city of St. Louis.

been located and arranged with reference thereto. The little watercourse meandered through the plaintiff's land and the land of adjacent owners for a distance of about one thousand yards, and then suddenly disappeared from view. But the water flowed constantly, and it was plainly to be seen that the stream continued on in a subterranean channel. Some distance away from the place where the watercourse disappeared, the defendant owned and operated a quarry. When he had reached a level of forty or fifty feet below the natural surface, he found a constant stream of water discharging itself from an aperture in the face of his quarry, and this interfered very seriously with his quarrying operations. It had been observed by persons interested in the matter that small sticks of wood which were put into the little stream where it left the plaintiff's lake, found their way and were discharged into the defendant's quarry through the aperture in its face just mentioned. The defendant then conceived and immediately executed a plan to relieve himself of the annoying water by firmly and effectually "plugging up" the aperture in the face of his quarry, and thus stopping the flow of the subterranean stream. The consequence of this action on the part of the defendant was that the water in the plaintiff's lake soon began to rise, and it kept on rising until it threatened to overflow its banks, and to inundate his gardens, driveways, walks, and houses, so as to render the place uninhabitable. At this stage of affairs he applied to the court for a mandatory temporary injunction against the defendant, requiring him to undo what he had done; to remove the obstruction he had put in the way of the subterranean stream that flowed into his quarry, and restraining him from interfering with the outflow of water through the opening in the face of his quarry. The order was granted as prayed, and the threatened wrong and mischief, and the irreparable injury which would have otherwise resulted to the plaintiff, was averted.

Suppose that the Chancellor had said in this case, "I will not compel the defendant to do so serious a thing as to undo what he has done, until the final hearing." Before the final hearing, the ruin of the plaintiff's estate would have been accomplished, and the defendant would have been permitted to enjoy the fruits of his own wrong, as the result of a lamentable defect in remedial procedure.

In the Pennsylvania case above mentioned, Judge Sharswood was forced to admit that there were some few instances in England in which a mandatory order was made on an interlocutory application, but he said these cases should not be followed as precedents.

The cases cited by him are *The Attorney-General v. The Metropolitan Board*,¹ and *Hepburn v. Lordan*.² In the first of these cases the defendants were constructing a system of sewers, to drain the sewage of a town into the river Lee. The effect of the work accomplished was to cause an obstruction to the navigation of the river. They were enjoined from continuing the discharge of sewage in this manner, and required to dredge the river so as to free it from the obstruction already existing. This order was made upon an interlocutory motion. In the second case a lot of damp jute had been stored and dried by the defendant on premises adjoining the plaintiff's house, at the imminent risk of combustion. The defendant was ordered to remove it.

Another case cited by Judge Sharswood, in *Audenried v. Phila. & Reading R. R. Co.*, is the leading case of *Lane v. Newdigate*.³ There the plaintiff was assignee of a lease that had been granted by the defendant for the purpose of erecting mills and other buildings; the lease contained covenants for a supply of water for the mills and works, from canals and reservoirs on the defendant's estates. The lessor suffered the canals and reservoirs to get out of repair, and was diverting the water of the canals, and by removing certain stop-gates drained the mill pool and canals so as to render the lessee's privileges useless. Lord Eldon, on the authority of *Robinson v. Lord Byron*,⁴ held that there was no objection to requiring repairs to be made, although some doubt was expressed on the matter. As to the restoration of the stop-gate, the Lord Chancellor said: "The question is whether the court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction I shall order will create the necessity of restoring the stop-gate, and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works." An order was framed accordingly.

In marked contrast to the vigorous sense of justice that is exhibited in the passage above quoted from the opinion of Sir George Jessel, in *Smith v. Smith*, Judge Sharswood makes the following comment upon these observations of Lord Eldon: "That is acknowledging that he could not, according to the principles and practice of the court, order the defendant in direct terms to restore

¹ (1863) 1 Hem. & Miller, 298, 321.

³ (1804) 10 Ves. 192.

² (1865) 2 Hem. & Miller, 345.

⁴ (1785) 1 Bro. C. C. 588.

the stop-gate and repair the works; the injunction should be so drawn that, although on its face restrictive only, it will, in order to comply with it, compel him to do these very things. This is not a precedent which ought to be followed in this or any other court. A tribunal that finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection."

These divergent views upon this subject serve to emphasize the difference in their mental attitude towards the essential aims of administrative or remedial justice, between a lawyer bred in the common-law courts, and accustomed to their technical and formal limitations, and one bred in the courts of equity, which do not ordinarily permit a mere technical rule, or a shortcoming of ordinary remedies or forms, to stand in the way of administering justice in its full sense and scope. In truth, the notion advanced by Judge Sharswood, that a preliminary mandatory injunction was an unheard-of procedure, was without any just foundation, as was pointed out by Vice-Chancellor Stuart, in *Beadel v. Perry*.¹ "Reference has been made," said that learned Vice-Chancellor, "to a supposed rule of court that mandatory injunctions cannot properly be made except at the hearing of the case. I never heard of such a rule. Lord Cottenham was, so far as I know, the first judge who proceeded by way of mandatory injunction, and he took great care to see that the party applying was entitled to relief in that shape."

The history of the development of the jurisdiction to grant mandatory injunctions is curious, as was observed by Sir George Jessel, in *Smith v. Smith*; but it was a necessary jurisdiction, and was gradually enlarged so that it may now be fairly regarded as sufficiently comprehensive to embrace every case in which equity and justice, which go inseparably together, really require the writ. And we shall presently see that wherever the wrong complained of affects the legal or equitable rights of the plaintiff seriously and to such an extent as to be irreparable, or wherever the continuance by the defendant of the injury, the commencement of which has brought the plaintiff into court for relief, would lead to the waste or destruction of the property, before final hearing, a court of equity will interfere by mandatory injunction on an interlocutory application, in all cases where this special jurisdiction of the court is needed to restore the property to that condition in which it existed immediately preceding the commencement of the wrong, or to bring

¹ (1866) L. R. 3 Eq. 465.

the matter in controversy back to the position from which the defendant's wrongful act has changed it, so that it may be preserved until the final decree. If it were otherwise, the administration of justice would be defective, which a court of equity is the last to admit.

It appears that from an early day the High Court of Chancery took jurisdiction to prevent by injunction the ploughing up of ancient pasture lands, and the early entries of restraining orders of this nature are collected in Tothill's Reports, pp. 143, 144. Among these is to be found the case of *Rolls v. Miller*,¹ which is probably the earliest instance of an order in chancery looking to a mandatory injunction; for in that case it appears that not only was the defendant restrained from ploughing up the pasture lands, but he was ordered to show cause why he should not lay down again that which he had ploughed.

Doubtless there are many instances in which the court exercised the jurisdiction to grant mandatory injunctions from that time forward. At any rate in 1716 the jurisdiction was no longer questioned, and it was applied by Chancellor Cowper, in the famous case of *Vane v. Lord Barnard*.² The circumstances of that case were these: The defendant on the marriage of the plaintiff, his eldest son, with the daughter of Morgan Randyll, and £10,000 portion, settled Raby Castle on himself for life, *without impeachment of waste*, remainder to his son for life, and to his first and other sons in tail male. Lord Barnard, having taken some displeasure against his son, got together two hundred workmen, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, etc., to the value of £3,000. On the filing of the bill the court granted an injunction to stay the committing of waste in pulling down the castle. This injunction was made perpetual on the hearing of the case, and it was decreed that the castle should be repaired and put into the same condition it was in before the acts of waste were begun; and for that purpose a commission was issued to ascertain what ought to be repaired, and a Master was appointed to see it done at Lord Barnard's expense. It is to be observed that the court, possibly foreseeing the difficulty it might encounter in compelling the defendant to do the necessary work of restoring the castle, did this work itself.

¹ (1640, 15 Chas. I.) Tothill's Rep. 144.

² (1716) 2 Vernon, 738; also reported as *Lord Barnard's Case*, *Precedents in Chancery*, 454.

*Robinson v. Lord Byron*¹ is generally cited as the earliest instance of a mandatory injunction. There a mandatory order was granted by Lord Chancellor Thurlow to restrain the defendant from preventing water flowing in regular quantities to the plaintiff's mill. The defendant could by means of stop-gates and flood-gates, maintained on his estates, prevent the water of the stream, on which the plaintiff's mill depended, from going to the mill in sufficient quantities for its operation, or inundate the plaintiff's land, which he had done on several occasions. He was restrained from permitting things to remain as they were.

In *Rankin v. Huskisson*,² a preliminary injunction was granted to restrain the defendant from building on part of a place adjacent to a plot leased to the plaintiff with a covenant that the ground adjoining the lot leased to him should be laid out and used as a garden, and no building whatever be erected thereon. In violation of this covenant the defendants commenced the erection of buildings in the garden site. The injunction restrained the defendants from completing the houses, and from permitting such part of the buildings as had already been erected on the garden site to remain thereon, until, etc.

In *Blakemore v. The Glamorganshire Canal Navigation*,³ Lord Chancellor Brougham intimated that on an interlocutory application for an injunction, the court will only act prospectively, and with a view to keep matters *in statu quo*, and will not, unless in a very special case, grant the order in such form as indirectly to compel some positive act to be done by the party enjoined. And he took occasion to remark that he agreed with the view that if the court has this jurisdiction, it would be better to execute it directly and at once.

In the *North of England Junction Railway Co. v. Clarence Railway Co.*,⁴ the defendant sought to prevent the plaintiff from constructing a bridge over its railway tracks, as plaintiff was authorized to do by act of Parliament, by erecting walls in such a position as to interfere with the erection of the bridge and the crossing of the defendant's railway over the same. A mandatory temporary injunction, in effect compelling the defendant to pull down these walls, so that plaintiff might proceed with the construction of its bridge, was granted by Vice-Chancellor Shadwell, who said: "It has been said that the injunction now sought is wholly man-

¹ (1785) 1 Bro. C. C. 588.

² (1830) 4 Sim. Rep. 13.

³ (1832) 1 Mylne & Keen, 154.

⁴ (1844) 1 Collyer's Rep. 507.

datory, and therefore proper to be refused. That injunctions in substance mandatory, though in form merely prohibitory, have been and may be granted by the court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary, under certain circumstances, to be exercised. Under what circumstances it should be exercised must be matter for judicial discretion, in each several case."

In *Goodale v. Goodale*,¹ an injunction was granted, before answer, to restrain defendants from parting with documents in their possession, belonging to the plaintiff, and from preventing her solicitor from having access to the documents at all reasonable times, and after reasonable notice.

Where the defendant had obstructed the passage of smoke from flues used by the plaintiffs for several years, but their right to which was doubtful, by placing tiles upon the top of the chimneys, a mandatory injunction was granted upon interlocutory motion, by Vice-Chancellor Wood, to compel defendant to remove the tiles.²

In *Durell v. Pritchard*,³ the mandatory injunction prayed for was refused, but the jurisdiction of the court to grant the same in proper cases was asserted. It was contended in this case that a mandatory injunction should not be granted where the damage was complete before the filing of the bill; but the court held that relief by way of injunction ought not to have been refused upon the mere ground that the damage had been completed before the bill was filed. "The authorities upon this subject," said the court, "lead, I think, to these conclusions: that every case of this nature must depend upon its own circumstances, and that this court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld." The matters complained of by the plaintiff were interferences with an easement of way and an easement of ancient light, but the interferences were found not to be extreme or serious, and plaintiff was permitted to sue at law for his damages.

In the more recent English cases we find the judgments of the

¹ (1848) 16 Sim. 316.

² *Hervey v. Smith* (1855), 1 Kay & John. 389.

³ (1865) L. R. 1 Ch. App. 244.

Court of Chancery largely influenced by Sir H. Cairns' Act,¹ an act of Parliament authorizing the court under certain circumstances to grant relief by way of damages, instead of relief by way of injunction. This was done in *Senior v. Pawson*,² where the defendant had erected a house which seriously interfered with the plaintiff's light and air. But as the plaintiff heard of the intended structure in April, and did not complain until November following, during which time defendant had laid out large sums; and the plaintiff had also, since the filing of the bill, offered to take a money consideration, — an injunction was refused and an inquiry of damages was ordered under the act just mentioned. The Vice-Chancellor, in passing on the case, said that he had no doubt as to the jurisdiction of the court to order the buildings to be pulled down, but considered it expedient under all the circumstances of the case to grant relief in damages instead.

Reference has already been made to *Beadel v. Perry*.³ In that case the defendant had commenced the erection of a wall which was likely to interfere with plaintiff's light and air, and plaintiff promptly sought the aid of the court for an injunction to restrain defendant from allowing the wall to continue of a height which would interfere with the access of light and air to plaintiff's windows, etc. An injunction was granted with leave to move for a mandatory injunction. Defendant continued his construction of the wall, and the motion for a mandatory injunction was made. Vice-Chancellor Stuart, having heard the evidence, said that defendant had built his wall much higher than he had the right to do, and to that extent must take it down. "There must be a mandatory injunction to that effect." Then follows the statement already quoted,⁴ and he continues: "Looking at all the circumstances of this case, I feel that I am bound to make an order for a

¹ 21 & 22 Vict., ch. 27 (June 28, 1858). This act is also cited as "The Chancery Amendment Act, 1858," 98 Stat. at Large, 72. By the 2d section of the act it is provided that: "In all cases in which the Court of Chancery has jurisdiction to entertain an application against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct." The remainder of the act provides for the mode of procedure in the assessment of damages.

² (1866) L. R. 3 Eq. Cas. 330.

³ (1866) L. R. 3 Eq. Cas. 465.

⁴ *Ante*, page 102.

mandatory injunction. If I did not do so, the injury which has been inflicted upon the plaintiffs, though partly before the bill was filed, would be continued ;” and an order was made accordingly.

In *Westminster Brimbo Coal and Coke Co. v. Clayton*,¹ the barrier between two mines had been perforated, and the owner of one of them artificially conducted the water of his mine so as to pass by the perforations into the other mine, that mode of removing the water from his mine being most beneficial to himself. The result was irreparable injury to the plaintiff. On an interlocutory application a mandatory injunction was granted, so as to bring things back into the state in which they were *ante litem motam*, and keep them there until the hearing. “The defendant is not at liberty by a new course of action to do irreparable damage to the plaintiff, and then, when the bill is filed, to say, ‘The *status quo* shall be the state of things after the act is done.’”

In *Cooke v. Chilcott*,² a purchaser of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building-sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor’s land. It was held by Vice-Chancellor Malins, that although the covenant was not one of which the court could decree specific performance, as being for the construction of works, which the court could not superintend, it could be enforced indirectly by an injunction restraining defendant from allowing the work to remain unperformed. This was upon the authority of *Storer v. Great Western Ry. Co.*,³ and *Lane v. Newdigate*.⁴

It would extend this article beyond reasonable limits to undertake here to mention the very numerous cases in the American reports in which mandatory injunctions have been granted. They all proceed upon the theory that where the circumstances of the case require this extraordinary remedy in order that justice may prevail, it will be granted. Many of the cases are collected and stated in a comprehensive and valuable note to the case of *City of Moundsville v. Ohio River R. R. Co.*,⁵ and in an excellent note to *Murdock’s Case*.⁶

I desire merely to refer to a few cases which tend to show how firmly the jurisdiction is now established, and how necessary it is

¹ (1867) 36 L. J. Ch. 476.

² (1876) L. R. 3 Ch. Div. 694.

³ (1842) 2 Y. & C. Ch. 48.

⁴ (1804) 10 Ves. 192.

⁵ (1892) 20 L. R. A. 161; 37 W. Va. 92.

⁶ (1829) 20 Am. Dec. 381; 2 Bland Ch. 461.

for a complete system of remedial jurisprudence. There seems still to be some conflict over the question whether a mandatory injunction may or should be granted on an interlocutory application; but the outcome of this conflict is inevitable, for the forces which are at work are irresistible, and will not rest until efficient and necessary remedies are established to meet every form of wrong, of which law and the courts can take cognizance.

Among the early American cases in which the matter is discussed is *Murdock's Case*.¹ In that case the plaintiff had purchased certain lands under a decree in chancery, and had been put into possession thereof by a writ of *habere facias possessionem*; but the defendant *Murdock* had erected, and persisted in continuing to erect, a fence so as to include part of the tract so purchased by plaintiff. It was stated in the bill that plaintiff had brought an action of trespass *quare clausum fregit* against defendant, which was still pending, and there was a prayer for an injunction prohibiting defendant "from continuing the said fence, and enjoining him to remove the said fence already erected," and for further relief. The court refused to grant a temporary injunction requiring defendant to remove the fence already erected, but enjoined him from completing it until the further order of the court. It will be seen that there were no special circumstances in the case requiring an immediate removal of the fence, and so the ruling of Chancellor *Bland* was quite correct. But he put his denial of the writ upon the ground that before imputed wrong can be removed, or anything like commutative justice can be administered, it is the duty of the court to give the party complained of an opportunity of being heard; that to order a defendant to pull down or remove any erection would be obviously and directly to deprive him of a portion of that which then, at least, appeared to be his property, and was so claimed by him. And it was his view that injunctions should be granted only in so limited a form as expressly or in terms to require no alteration in the existing state of things, or anything to be undone or restored, except in so far as a restoration may consequently follow as a necessary result of the merely restrictive operation of the injunction.

But in this very case, pragmatic trespassers having continued the construction of the fence after the preliminary injunction had been awarded, it was ordered upon a motion to attach and punish

¹ (1829) 2 *Bland Ch.* 461; s. c. with note on mandatory injunctions, 20 *Am. Dec.* 381.

them and defendant for a violation of the writ, that these trespassers should, and they were commanded and required, without delay, to take down and remove the fence erected by them.

It is the experience of every lawyer that in the examination of the decided cases on any subject he will constantly meet with *obiter dicta* in the opinions of the judges. These are often productive of mischief; but the main objection to them is that they tend to introduce uncertainty and confusion into the law. And so we often find broad statements, unnecessary to the decision of the case, announcing a general proposition which has no just foundation in the law. Thus, in a recent case, the defendant had erected a line fence between his own and the plaintiff's house; the houses were about two feet apart, and the line was midway between them. Defendant erected a board fence on the line, to the height of sixteen feet, shutting off the light from complainant's windows, and it was alleged that this was maliciously done. On a motion for a preliminary injunction the writ was granted, and defendant was commanded to at once take down or remove the fence, and not to renew, rebuild, or continue the same. Now it is quite plain that the case did not present the exigencies demanding an immediate alteration of affairs; and so the court might have ruled and no ill consequences would follow from the ruling. But it was decided by the Supreme Court that the court below had no power to determine the rights of the parties on affidavits, or on a motion for a preliminary injunction. This could only be done on final hearing. All this is quite true, but the mischief lies in this, that we now find the case cited as an authority for the proposition that a mandatory injunction should not be granted on preliminary hearing.¹

Let us briefly consider the circumstances in a few of the American cases, which have called forth the aid of a court of chancery through this extraordinary remedy: —

In *Pierce v. City of New Orleans*,² the plaintiff and defendant were tenants in common of a wall, which had always been a blank wall, and which stood adjacent to and in the rear of plaintiff's dwelling-house and yard. Without the plaintiff's consent the defendant made certain openings in this wall, thereby creating a nuisance which affected indefinitely the privacy of plaintiff's family residence so seriously as to inflict irreparable injury. A preliminary injunction was granted upon motion, and defendant was ordered to close

¹ *Ladd v. Flynn* (1892), 90 Mich. 181; cited in note, 20 L. R. A. 161.

² (1866) 18 La. Ann. 242.

up the openings in the wall, and to restore the same to its original condition, and keep it so during the pendency of the suit.

A case arose before Sawyer, Circuit Judge, in the District of Nevada, between two mining companies.¹ The plaintiff, in excavating a tunnel in the mountain to its mining claim, struck a subterranean flow of water, which it appropriated and enjoyed for several years. The defendants ran a tunnel from a distant point into the mountain, to a point about thirty feet directly under the point where the plaintiff obtained this water; thereupon the water, which before flowed through the plaintiff's tunnel, was intercepted and discharged through defendants' tunnel, and by them appropriated to their own use. Upon a motion for an interlocutory mandatory injunction, it was urged, in opposition, that the injury had been committed, and that, this being so, the court would not, on motion for a preliminary injunction, issue a mandatory writ, affirmatively commanding the performance of an act, such as to fill up a tunnel, rebuild a wall that has been demolished, and the like. The learned judge in disposing of the motion was inclined to the opinion that the authorities were to this effect. But after citing *Robinson v. Lord Byron*, *Lane v. Newdigate*, and other cases to which I have called your attention, he said: "Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up or build a water-tight barrier across the tunnel to accomplish the end sought." An order was framed accordingly, and this ruling was approved on a motion to dissolve the injunction, by Mr. Justice Field. The case may be regarded as a leading case on the subject.

A bill was filed, wherein the plaintiff sought an injunction against obstructing a passageway over and upon which he had a right to pass and repass. Plaintiff owned the land on one side and defendant on the other, and the passage was about five feet wide, running from one of the streets in Boston, between the two parcels of land. Defendant had begun the erection of a wall of a building within this passage. A preliminary injunction was denied, and the defendant completed the wall. Upon final hearing the merits were found to lie with plaintiff, and a mandatory injunction was granted, commanding defendant to take down the wall and so alter

¹ *The Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.* (1871), 1 *Sawyer*, 470, 685.

his building as to leave the passageway unobstructed, and to pay the plaintiff the damages suffered pending the suit, on account of the encroachment. "The defendant having by the service of process," said the court (Gray, Chief Justice), "full notice of the plaintiff's claim, went on to build at his own risk; and the injury caused to the plaintiff's estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrongdoer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition."¹

I have already mentioned the case of *Coe v. Louisville & Nashville R. R. Co.*² That case is typical of many others in which the mandatory injunction was the remedy applied to bring about the performance of duties or contracts by railroads and other common carriers, and to regulate matters relating to commerce. Many such cases are stated in the note to *Moundville v. Ohio River R. R. Co.*³ In the *Coe* case the plaintiff had purchased a lot contiguous to defendant's depot in Nashville, and fitted up a stock-yard thereon at considerable expense. There was no express contract between plaintiff and the railroad company in relation to the matter; but the yard was and had been a convenience to the defendant's business, and by defendant's permission or acquiescence it was connected with the railroad by gaps and pens. After the yard had been used by both parties for more than twelve years, the defendant entered into a contract with the Union Stock Yard Company for the erection of a stock-yard outside the city limits, more than a mile distant from plaintiff's yard; and among other things defendant agreed with this stock-yard company that it would deliver all stock shipped to Nashville at this new yard, and that it would not deliver it at any other point in the city. The railroad company accordingly notified the plaintiff that it would not deliver stock shipped to him at his yard after a specified date. Thereupon the plaintiff filed his bill in which he prayed for an injunction to restrain defendant from interfering with or in any manner disturbing the enjoyment of the facilities now afforded to complainant by defendant upon its lines of railway, for the transaction of business, and from refusing to deliver stock at plaintiff's yard, and from interfering with or in any way disturbing the business of plaintiff,

¹ *Tucker v. Howard* (1880), 128 Mass. 361.

² (1880) 3 Fed. Rep. 775.

³ (1892) 20 L. R. A. 161, 166.

and from refusing to permit the plaintiff to continue on the same terms as heretofore. The injunction was granted as prayed. The court considered that the urgency of the case demanded it. The duty sought to be enforced was one imposed and defined by law, and a suspension of the accommodations enjoyed by the plaintiff would work irreparable mischief.

A telephone company unlawfully and without the consent of the owner, but against his protest and warning, set up poles upon his land. He promptly applied to the court for an injunction; but, before the order to show cause could be served upon the company, it completed the setting of the poles. When the matter came on for hearing on the order, the defendant urged that the temporary injunction, if granted, should not require it to remove the poles, but only restrain it from putting on the cross-bars and wires. To this the Chancellor answered: "The fact that the setting of the poles is finished is due to the activity of the defendants in completing the work. Where a defendant thus invades the proprietary rights of a complainant he has no ground for asking that the court will give him the benefit of his activity and persistence in wrongdoing. . . . Where there is a deliberate, unlawful, and inexcusable invasion, by one man, of another's land, for the purpose of a continuing trespass for the trespasser's gain or profit, and there has been neither acquiescence nor delay in applying to this court for relief, the mere fact that the trespass was complete when the bill was filed will not prevent an injunction mandatory in its nature, against the continuance of the trespass." The writ prohibited the defendants from setting any poles on the lands of the plaintiff, and from allowing those which they had placed thereon to remain.¹

Plaintiffs and defendants were occupants of different parts of the same house under the same landlord. The defendant occupied the basement, in the rear of which was situated a furnace, which by means of pipes and registers furnished heat to the plaintiff's apartments on the first and second floors. The use of the furnace was granted plaintiff by his lease, and defendant knew this, and for years had acquiesced in plaintiff's right to pass through the defendant's shop to give the necessary attention to the furnace. There was no other means of access to the furnace. One day the defendant notified the plaintiff that he would not, after a specified date, be permitted to pass through the shop to the furnace. This

¹ *Broome v. N. Y. & N. J. Telephone Co.* (1886), 42 N. J. Eq. 141.

brought the plaintiff into court for an injunction. A mandatory temporary injunction was granted commanding the defendant to permit the plaintiff to pass through the shop of defendant in such manner and at such times as might be necessary to give such care and attention to the furnace as might be required for the use thereof in heating the plaintiff's rooms.¹

It is curious in what manner these cases present themselves, and how the admirable flexibility of the equitable remedy is frequently taxed by ingenious arguments in favor of the wrongdoer. But equity considers the substance of things and adapts its remedies to the exigency of each case. An important illustration of this principle, as well as of the special jurisdiction we are now considering, is to be found in *Wheelock v. Noonan*.² There the plaintiff gave to the defendant a parol and gratuitous license to place upon certain unoccupied lots of his in the northern part of New York City a few rocks, under the defendant's promise that he would remove them in the spring following. During the winter and without the plaintiff's knowledge the defendant covered six of the lots with heavy boulders to the height of from fourteen to sixteen feet. In the spring, plaintiff discovering what had been done, directed the defendant to remove the rocks. Defendant having failed to do this, the plaintiff filed his bill to compel him to do so. The court awarded judgment requiring the defendant to remove the rocks by a specified day, unless for good cause shown the time should be extended by the court. It was contended that the plaintiff could have removed the stone himself and then recovered of the defendant the expense incurred. "But," said the court, "to what locality could the owner remove them? He could not put them in the street; . . . and it would follow that the owner would be obliged to hire some vacant lot or place of deposit; become responsible for the rent; and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such a burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority." The judgment of the lower court was affirmed.

The jurisdiction of a court of equity to grant injunctions mandatory in effect has been recognized by the Kansas City Court of Appeals, in *Sedalia Brewing Co. v. Sedalia Water Works Co.*,³

¹ *Hodge v. Giese* (1887), 43 N. J. Eq. 342.

² (1888) 108 N. Y. 179.

³ (1889) 34 Mo. App. 49.

and by the St. Louis Court of Appeals in *Albers v. Merchants' Exchange*.¹

In the former case the defendant was compelled by an injunction, negative in form but mandatory in effect, to continue to furnish water to the plaintiff's brewery, under the terms of an existing contract, which defendant was about to violate and disregard, to the plaintiff's irreparable injury. In the latter case, the Merchants' Exchange had wrongfully suspended the plaintiff and were excluding him from attending the Exchange to transact his business there. A mandatory temporary injunction granted by the Circuit Court was made perpetual on final hearing, and defendant was restrained from excluding plaintiff from the privileges of the Exchange.

And so it has been held that a mandatory injunction to remove a wall encroaching on another's property may be granted, and the obligation to remove placed directly on the party who caused the wall to be erected.² In this case the wall encroached nine inches upon a narrow passageway belonging to the plaintiff, and seriously interfered with its use. It was contended that the plaintiff had an adequate remedy by ejectment. But the court said: "The sheriff might not regard it as his duty to deliver possession by taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included within the nine inches. But in equity the obligation to remove can be placed directly on the party who caused the wall to be erected, and it frequently affords relief in such cases."

The Supreme Court of Pennsylvania has not adhered to the doctrine laid down by Judge Sharswood. In a recent case, where a natural gas company made a contract with the owner of glass works to supply him with gas for fuel for all purposes connected with the manufacture of his wares, so long as natural gas may continue to be produced from the territory then or thereafter owned or operated by the gas company, on a bill averring that plaintiff had relied on this contract, and constructed his works for the use of natural gas only as fuel, and that the company had shut off the entire supply while the works were in operation, thereby making irreparable damage imminent, the court held that it was error to refuse a preliminary injunction mandatory to the extent of restor-

¹ (1890) 39 Mo. App. 583.

² *Baron v. Korn* (1891), 127 N. Y. 224 (27 N. E. Rep. 804).

ing the *status quo*. The judgment of the lower court was reversed with directions to grant the mandatory injunction indicated.

Where two persons were jointly entitled to the use of a pipe, which supplied their respective apartments in a double house with water, and defendant was about to shut off the water, and had actually stopped the water-pipes and prevented the flow of water to the plaintiff's apartments, the court made a mandatory order requiring defendant to open up the pipes and permit the flow of water to the plaintiff's premises. This was held correct.¹

An important case upon this subject was decided by the Supreme Court of Appeals of West Virginia.² There the municipal government had granted a license to a railroad company to build its road across, along, and upon a street, upon certain conditions fixed by the ordinance requiring the company to restore the street, and do certain work in connection therewith, necessary for the preservation of the street and its usefulness as a public highway. The company constructed its road, but failed to do the work necessary to restore it, and left it so impaired as to render it dangerous to use. The city filed its bill in equity asking a mandatory injunction to the company to put the street in certain order, and to do certain work according to the requirements of the ordinance granting the license. Relief was granted as prayed. Answering the contention that the city had an adequate remedy either by mandamus, or by an action for damages, the court said: "What the city needs is specific performance by the railroad company, of the duty resting upon it, and no other relief is effectual. It is now settled that injunctions are not only, as is usually the case, preventive or prohibitory, but also mandatory, commanding positive or affirmative action to be taken or done by the defendant, as mandamus does at law. At one time the mandatory injunction, because injunctions had always been couched in prohibitory language, was framed in that form only by prohibiting the doing or continuing to do a given thing, thereby compelling the party to do the thing which it was desired he should do, because by continuing to do as he had done he became liable to punishment; but in later times this species of injunction has lost this delicacy, and now, when used, assumes the form of command to do a specific act." The jurisdiction was sustained, and the decree affirmed. The case is an important one, and marks the

¹ *Brauns v. Glesige* (1891), 130 Ind. 167.

² *City of Moundsville v. Ohio River R. R. Co.* (1892), 37 W. Va. 92; 20 L. R. A. 161, with note.

advance which is being made to make remedies more direct and effectual.

Reference has already been made to *Toledo, A. & N. M. Ry. Co. v. Pennsylvania Co.*¹ That case has since been cited with approval, and followed several times.² The effect of the injunction in that case was to require the defendants to perform their duty under the third section of the Interstate Commerce Act. It was negative in form, and enjoined the defendants from refusing to offer and extend to the plaintiff company the same equal facilities for interchange of traffic on interstate business between the defendant companies and the plaintiff, as are enjoyed by other railway companies, and from refusing to receive from plaintiff company cars billed from points in one State to points in another State, which might be offered to the defendant companies by the complainant; and from refusing to deliver in like manner to the complainant cars which might be billed over its line from points in one State to points in another State. The case arose out of the refusal of the defendant companies to handle such cars for the plaintiff company, because certain of their employees had declared a boycott against the defendant companies. The injunction was granted upon the filing of the bill, and although negative in form, it was mandatory in effect, and is spoken of by Judge Ricks as a mandatory injunction.

Upon the principle of this case, the employees of another railroad company, who had refused to perform their usual and customary duties, were required by a preliminary mandatory injunction to perform all of their regular and accustomed duties so long as they remained in the employ of the complainant company. The refusal of these employees to handle Pullman cars on its road, as it was bound by contract to haul them, had the effect to interrupt interstate commerce and the transmission of the mails, and subjected the company to suits and great and irreparable damage.³

The flexibility, usefulness, and efficiency of this writ is shown by a recent case in Minnesota.⁴ The complainant in that case was the trustee in a railroad mortgage, given to secure bonds to the amount of \$5,000,000. The defendant had recovered a judgment

¹ (1893), 54 Fed. Rep. 746.

² See *Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co.* (1894), 60 Fed. Rep. 803, 814; *Southern Cal. Ry. Co. v. Rutherford* (1894), 62 Fed. Rep. 796, 797.

³ *Southern Cal. Ry. Co. v. Rutherford* (1894), 62 Fed. Rep. 796.

⁴ *Central Trust Co. of New York v. Moran* (1894), 56 Minn. 188; 57 N. W. Rep. 471.

against the railroad company, and caused a levy to be made on an execution which had been issued upon his judgment, upon two locomotives and two passenger coaches, and these were advertised for sale under the levy. The levy itself was wrongful, because it was the law of Minnesota that the roadbed, franchises, rolling-stock, etc., of the railroad company were an entirety, and could not be separately levied on. The complainant's lien and right was to the entire property, and the sale of these locomotives, as well as their being held in the custody of the sheriff, tended to inflict an irreparable injury upon the company as well as upon the complainant. A preliminary mandatory injunction, requiring the defendants (the execution creditor and the sheriff) to restore the engine and cars to the railway company, and restraining them from making the sale, was granted, and the order was affirmed.

The tendency to extend the remedy by mandatory injunction in proper cases is illustrated also by a recent case in Oregon.¹ There a dispute had arisen as to the true boundary line between plaintiff's and defendant's lots in the city of Portland. Plaintiff had erected an expensive frame building, and defendant claiming that it encroached an inch or two on his property, notified the plaintiff to remove the encroaching part. Plaintiff having failed to observe the notice, defendant cut down the parts that projected over the line, taking off the water table, window sills, sheathing, etc., of the projecting wall, and inflicting a damage of \$1,750 to the plaintiff's house. Defendant then began the construction of his improvements, and started the foundation under the surface up to the line which he claimed to be the true dividing line, but as the wall was raised, it projected an inch beyond this line. Plaintiff promptly applied for a mandatory injunction to compel defendant to remove that portion of the wall that projected beyond the line claimed by plaintiff to be the true dividing line, and for damages to her building. The line claimed by plaintiff was found to be the true dividing line. No temporary injunction was granted, but on a trial of the merits a perpetual mandatory injunction was awarded, with a judgment for damages for \$1,750.

The subject is considered with care and learning by Moore, J., who in discussing the matter said: "The question is whether the plaintiff will suffer irreparable injury, and, if so, has she a plain and adequate remedy at law. If in an action of ejectment the wall cannot be removed, the injury resulting from its erection could not

¹ Norton v. Elwert (1895), 29 Oregon, 583; 41 Pac. Rep. 926.

be compensated by any measure of damages, however great the sum which a jury might award, for it would, in effect, amount to a condemnation of the plaintiff's property, and an appropriation of it to the defendant's private use; and to concede that even so small a strip of plaintiff's premises could be thus taken would be to admit a rule of law which must necessarily be almost limitless in its application. In an action at law it would be difficult for the plaintiff to regain possession of that portion of her land occupied by the wall; for the sheriff, when called upon, might well hesitate to execute a writ commanding a restoration of the premises, since he must cut the wall to the division line, and in doing so he might take more than the 'merchant's pound of flesh,' and thus render himself liable in damages to the defendant. *Baron v. Korn*, 127 N. Y. 224 (27 N. E. Rep. 804). The removal of the wall being difficult, the plaintiff has no plain remedy at law. In all such cases equity will, upon the theory that wherever there is a right there is also a remedy, interpose and grant complete relief, and for that purpose will, where there has been no unreasonable delay in seeking the relief, award a mandatory injunction, and place the obligation of removing the structure upon the party who causes it to be erected."

Many other instances of mandatory injunctions, both interlocutory and final, might be given, but that would not only extend this paper beyond the reasonable limits to which it is entitled in your proceedings, but try your patience beyond a reasonable degree. The cases all proceed upon the principles I have endeavored to state and explain. No one can arise from an examination of these authorities without being impressed with the dignity, the grandeur, and splendid efficiency of that system of remedial jurisprudence, which has grown up in the course of years, as the result of the genius and labor of the most remarkable galaxy of great men known to the juridical history of the world, that splendor of our English and American law, which we call equity.

Jacob Klein.

THE BICYCLE AND THE COMMON CARRIER.

BICYCLING has introduced into the law of common carriers a question of curious interest, and if it has not made new law it has at least furnished another interesting example of what has long been the chief boast and glory of our common law,—the flexibility of its precedents and the adaptability of its general principles to new facts and changed conditions. The particular point to which now we call attention is whether or not a common carrier, irrespective of statute, is bound to carry a passenger's bicycle as his baggage, and therefore without extra compensation. Most railroads have arbitrarily refused to do so, and have demanded small sums for their transportation; and passengers have submitted to this trifling extortion rather than be bothered with a vexatious lawsuit over pennies. Therefore, in considering this question we are, with a single exception, without direct precedent, and may look at it as an original question.

This exception is a rather unsatisfactory decision given in May of the last year by the St. Louis Court of Appeals,¹ to the effect that under a statute which provided that the charges of the carrier for transportation of a traveller should include the carriage of one hundred pounds of "ordinary baggage," a passenger was not entitled to have his bicycle (which weighed only thirty pounds) carried, and in spite of this statute the carrier was justified in "fixing a special charge for the transportation over its railroad of 'bicycles, tricycles, and baby carriages,' and excluding all these from the category of ordinary baggage."

The opinion of the court is not altogether convincing and free from doubt. They accept the general definition of Lord Chief Justice Cockburn in *Macrow v. Great Western Railway*,² "Whatever the passenger takes with him for his personal use or convenience, according to the habits of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate

¹ *Missouri v. Mo. Pacific Ry. Co.*, 71 Mo. App. 385. See also 31 *American Law Review*, 463.

² *L. R. 6 Q. B.* 612.

purpose of the journey, must be considered as personal luggage." They then at some length show that the term "bicycle" is treated "as convertible by the lexicographers, and is (are) defined as 'a light vehicle or carriage,'" and "so in cases involving the use of streets, the payment of tolls, and liability for negligence, bicycles are uniformly held to be vehicles or carriages." The reasoning is hardly conclusive, for while for certain purposes a bicycle may be classed as a vehicle, yet for other distinct purposes it may belong to another general class. The court are like the old woman who remonstrated with the railroad guard about the tariff to be paid on her domestic menagerie with which she travelled, when the only rule of the railroad was that a shilling should be charged for the transportation of dogs, and the guard explained, "You see, mum, cats is dogs, and parrots is dogs, but a tortoise is a h'insect."

The court add that mere utility or convenience at the end of the journey is not sufficient to induce them to call bicycles baggage, and that "our opinion is that, from their nature, structure, and classification, bicycles belong to those things which are properly the subjects of freight contracts, and not embraced in the class of things denoted by the words 'personal or ordinary baggage.'" They then support their conclusion with the observation that "they have been in much use both here and in England for some years. We have been wholly unable to find any precedent for a different conclusion. As a matter of general learning we do know that bills have been introduced into the legislative bodies of the different States to make it the duty of carriers to transport them as ordinary or personal baggage. This demonstrates that, in the judgment of the profession at large, they have no right to be so considered, in the absence of express statutes." But may not these statutes be merely declaratory of a principle of common law which would be clear only after an express decision of a law court, and as no person has sufficient interest at stake to resort to the court for their decision, may not the legislatures have taken upon themselves the duty of settling the rights of the travelling public?

An English decision of a lower court has taken this same view. It is true that this decision is of no great weight, but it is interesting as illustrating the general tendency.¹

Just what is to be included within the term "baggage" has never been considered capable of strict judicial definition. The term has

¹ The Law Journal, London, Oct. 9, 1897, page 484.

varied and grown with the advance in our travelling facilities. Story's definition of "baggage" of over sixty years ago¹ as, "such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in trunks of passengers, which are not designed for any such use, but for other purposes, such as sale and the like," has expanded to-day into the elaborate definition of Professor Lawson:² "The term 'baggage' means such goods and chattels as the convenience or comfort, the taste, the pleasure, or the protection of passengers generally make it fit and proper for the passenger in question to take with him for his personal use, according to the habits or wants of the class to which he belongs, either with reference to the period of transit or the ultimate purpose of the journey."

Thus the decisions and text-books give us but one definite limitation to the term "baggage," and that is that it must be something for the personal use of the traveller. This of course immediately shuts out a large number of cases dealing with samples of goods of commercial travellers;³ but within the otherwise wide and vague limits of such a definition there is still room for great differences of opinion and most conflicting decisions. In the words of Chief Justice Earle,⁴ "It is impossible to draw any well defined line as to what is and what is not necessary or ordinary luggage for a traveller; that which one traveller would consider indispensable would be deemed superfluous and unnecessary by another. . . ."

A closer examination of authorities, however, I think will disclose that there are two classes of considerations which arise and determine this question in every case. The first group of considerations relates to the journey, the second to the traveller's *personnel*. Under the first head we must consider the nature of the carrier and the nature and extent of the journey. As the transportation facilities have developed, the demands of the passengers have grown correspondingly. We ask from the modern carrier that has at its command steam engines, palace cars, or fast ocean steamers, conveniences and comforts that would have been ridiculous to think of in the days of coaches and sailing vessels. With each improve-

¹ 1 Story, Bailments, § 499.

² Lawson, Bailments, § 272.

³ See Hutchinson, Carriers (2d ed.), page 822, note 1, and Lawson, Bailments, page 394, note 4, for a collection of authorities.

⁴ Phelps v. Northwestern Ry. Co., 19 C. B. N. s. 321.

ment our rights to carry baggage have expanded, and the baggage cars of to-day offer a service that would have been impossible seventy-five years ago. It is always important to bear this in mind in considering the older authorities when these questions are to-day before our courts. No less important than the nature of the carrier is the nature and extent of the journey itself. It is of course only too evident that what may be necessary for a trip on land is totally unfit for a voyage at sea,¹ and a long journey demands preparations and provisions that would be absurd for a short one. Thus not only does the kind of necessities which each passenger may carry with him as baggage vary with the details of each journey but also the quantity.¹ What is necessarily a part of each traveller's *impedimenta* must therefore be considered each time a question is raised thereon in the light of all these attending circumstances. This can be illustrated in no way better than in that class of cases where the traveller seeks to recover for money which he packed with his baggage, and for the loss of which he now seeks to hold the carrier liable. In Illinois \$300² and in New York \$285³ and \$800⁴ were under proper conditions considered part of the traveller's baggage, while in another case \$439⁵ was held so large a sum that the traveller would be unreasonable in having it in his trunk, and it could not be considered as baggage; while the Massachusetts court was in doubt about the sum of \$325, and sent the case back for a new trial for further evidence.⁶

In the second group of considerations we must examine the *personnel* of the traveller. It is only too obvious that what is necessary for a woman has no place in the baggage of a man.⁷ So, too, "the station in life" of the traveller is a most essential consideration to determine what may be necessary for his "conven-

¹ Cadwallader v. Grand Trunk Ry. Co., 9 Low. Can. 169; Wood v. Devin, 13 Ill. 746; Davis v. Mich. S. & N. I. R. R. Co., 22 Ill. 278; Dexter v. Syracuse, B. & N. R. R. Co., 42 N. Y. 326; Duffy v. Thompson, 4 E. D. Smith (N. Y.), 178; Ouimit v. Henshaw, 35 Vt. 605; Michigan S. & N. I. R. R. Co. v. Oehm, 56 Ill. 293; Parmelee v. Fischer, 22 Ill. 212; Grant v. Goodwin, 1 E. D. Smith (N. Y.), 95.

² Illinois C. R. R. Co. v. Copeland, 24 Ill. 332.

³ Weed v. Saratoga & S. R. R. Co., 19 Wend. (N. Y.) 534.

⁴ Merrill v. Grinnell, 30 N. Y. 594. See also Grant v. Newton, 1 E. D. Smith (N. Y.), 95; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Duffy v. Thompson, 4 E. D. Smith (N. Y.), 178; Bowman v. Maxwell, 9 Hump. (Tenn.) 624; Johnson v. Stone, 11 Hump. (Tenn.) 419.

⁵ Davis v. Mich. S., etc. R. R. Co., 22 Ill. 278, 74 Am. Dec. 151.

⁶ Jordan v. Fall River R. R. Co., 5 Cush. 69. See also Torpey v. Williams, 3 Daly (N. Y.), 162; Doyle v. Kiser, 6 Ind. 242.

⁷ Chicago, R. I. & Pac. R. R. Co. v. Boyce, 73 Ill. 510.

ience, comfort, taste, pleasure, and protection" during his journey. Having this in mind, \$1,400 worth of jewelry has been held properly part of the baggage of a person of wealth,¹ while the Supreme Court of the United States has said that two hundred and seventy-five yards of lace worth \$10,000 is essential to the convenience and comfort of a Russian lady of fortune, when a traveller in America, as part of her baggage.² Likewise feather-beds, pillows, towels, blankets, table-covers, etc., repeatedly have been held properly to be part of the baggage of an emigrant.³

As it is quite as necessary for the traveller to provide for his needs at the end of his journey as well as for those while he is actually travelling, the principle has generally been recognized that a traveller is entitled to have carried with him whatever is essential to the ultimate purposes of his journey. That is, in this second group it is always imperative to consider what is this "ultimate purpose of the journey" in order to arrive at a full understanding of what is, under all the circumstances of the case, baggage. The traveller must not only reach his destination in comfort, but he must reach it with such materials and implements that he will be enabled to perform the functions or do the work for the performing of which at a particular place he has taken his journey. As it is somewhere tersely put, "the traveller is entitled to carry with him as baggage the peculiar implements of his profession, the taking of which has arisen from the fact of his journey." The courts have repeatedly emphasized this principle. In the United States Supreme Court we have a decision that the surgeon travelling to his patient is entitled to have his surgical instruments carried as baggage.⁴ And again, for the mechanic going to work, the carrier must transport his tools;⁵ for the student, his books;⁶ for the pleasure-seeker, his opera-glasses;⁷ for the barrister, his wig and gown, and possibly his reports;⁸ and for the sportsman, his gun.⁹

¹ *Coward v. E. Tenn. V. & G. R. R. Co.*, 16 Lea (Tenn.), 225.

² *New York, etc. R. R. Co. v. Fraloff*, 100 U. S. 24.

³ *Parmelee v. Fischer*, 22 Ill. 212; *Ouimit v. Henshaw*, 35 Vt. 605. But see *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612.

⁴ *Hannibal Railroad v. Swift*, 12 Wall. 262.

⁵ *Kansas City, etc. R. R. Co. v. Morrison*, 34 Kan. 502; *Porter v. Hildebrand*, 14 Pa. St. 129, and 2 Harris (Pa.), 129; *Davis v. Cayuga & S. R. R. Co.*, 10 How. Pr. (N. Y.) 330.

⁶ *Hopkins v. Westcott*, 6 Blatch. 64.

⁷ *Toledo, W. & W. Ry. Co. v. Hammond*, 33 Ind. 379.

⁸ *Munster v. South Eastern Ry. Co.*, 4 C. B. N. s. 676.

⁹ *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.), 454.

There is, naturally, a limit in reason as to what carriers are thus bound to transport for such travellers as baggage. Of course it is true, as the St. Louis Appellate Court suggests, that "mere utility or convenience at the end of the journey is not sufficient." The articles must be connected with the purpose of the journey. Then, too, carriers are obliged to carry only such articles as are generally used by persons of this class of travellers, and only in such quantities as are reasonable. Thus a father of a family may not insist on the carriers transporting for him a seventy-eight pound spring horse, forty-four inches in length, which he was taking home with him;¹ nor may a musician insist on carrying a pianoforte or an organ, nor a student a whole library, nor a mechanic the tools and machinery of a machine-shop² nor an actor the paraphernalia of a theatre.³

Considering, then, the status of the bicyclist in the light of all these decisions, let us see how the case stands. It must be borne in mind that the bicyclist patronizes almost exclusively the "local trains, or, at most, "local expresses." These trains, although they almost always have a baggage car attached, usually handle very little baggage, so that on a summer's day as the bicyclists stream out from, or back to, town they will be the only ones who will take advantage of the baggage car. It should also be remembered that it is generally on a Sunday or holiday that bicyclists make use of trains, and it is on just such days that the least demand is made upon their baggage facilities by the travelling public at large.

Looking at the question from these two points of view, we find that we have, first, the local carrier, a short journey, and a slow-moving train. In this combination we have the train, already including a suitable baggage car which would otherwise be but little patronized, moving at such a rate and for such a distance that no special attention need be paid to the packing of bicycles in the car. But even if this were not so, would it be asking too much of our modern railway carriers to supply a special car for the transportation of bicycles when we consider how many extra dollars they put into the railroad companies' pockets? Look any holiday at the crowds who flock to the railway stations with their bicycles to be transported beyond the city limits so as to enjoy a day of country

¹ *Hudston v. Midland Ry. Co.*, L. R. 4 Q. B. 366.

² *Merrill v. Grinnell*, 30 N. Y. 594, 619.

³ *Oakes v. N. Pac. R. R. Co.*, 20 Oregon, 392.

riding, or returning weary from a ride into the country, are carried back to town; and then calculate how many extra passengers the bicycle makes for the railroad.

Secondly, if the surgeon is entitled to have his surgical instruments carried, and the mechanic his tools, the student his books, and the sportsman his gun, why may not the bicyclist have his bicycle transported with him? It is difficult to see why not. The instruments of the surgeon, the tools of the mechanic, the books of the student, or the gun of the sportsman are each respectively no more intimately connected with the purpose of the journey of the traveller than is the bicycle with the purpose of the bicyclist's journey. The bicycle has, perhaps, in point of time, a closer connection, for the surgeon, the mechanic, the student, or the sportsman may reach his destination in advance of his baggage without perhaps serious inconvenience; but if on reaching his destination the bicyclist is not able immediately to get his bicycle and ride on, the very purpose of the journey is defeated.

The only arguments that can be made in favor of the carrier are: first, that the bicycle is inconvenient to carry on account of its size and shape; and, second, that it is not customarily carried as baggage. To the first we answer that bicycles are very generally and usually carried when an extra tariff is paid, and although charging a few extra pennies for transportation does not alter the size and shape of the bicycle, yet it silences complaints, and we hear nothing further of inconvenience. We do not admit the second, for to-day it hardly yet can be said to be a general custom. There is danger, however, in the continued submission of the bicyclist to the extortionate demands of the carrier that the arbitrary practice will ripen into a universal custom, and then at last stiffen into a rigid rule of law, to deprive a bicyclist of his right to have his bicycle transported with him as his personal baggage without the court ever sufficiently considering the subject. It may be that when this question is presented again the court may reach the same conclusion as the Missouri court. Perhaps, however, some court may be influenced to interpret the definition of "baggage" in a way commensurate with the development of the steam and electric carriers of to-day, still having in mind the much quoted words of Lord Chief Justice Cockburn,¹ "Whatever disadvantages attach to a system of unwritten law, and of these we are

¹ *Wason v. Walter*, L. R. 4 Q. B. 73, 93.

fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."

Lee Max Friedman.

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ILLINOIS INHERITANCE TAX. — The recent decision of the Supreme Court of the United States upholding the validity of the Illinois Inheritance Tax Act, *Magoun v. Illinois Trust and Savings Bank* (reported in Chicago Legal News, May 7th), derives considerable interest from the practical importance of the result, as well as the fact that the opinion is delivered by the new member of the court, Mr. Justice McKenna. The case does not seem, however, to cast any new light upon the principles of constitutional law; as in truth the constitutional objections which the appellants attempted to raise to the validity of the law appear to offer no serious difficulties. Inheritance tax laws, substantially similar to that of Illinois, have been passed in many of our States, as well as in England, and have received considerable attention from our courts. Such a tax has universally been recognized as a proper exercise of legislative power, and as being in substance a tax upon the right of succession created by laws concerning testamentary disposition and distribution in intestacy, and not a tax directly upon property. The constitutional objections which have been raised have usually been directed to the classification or system of exemptions in a particular law, and have been alleged to arise under provisions in State constitutions prescribing uniformity of taxation. These objections have generally been held by the State courts to have no force; though in New Hampshire, Ohio, and a few other States they have been sustained by a somewhat narrow construction, as it would seem, of particular clauses of State constitutions. The courts of the United States have, in several cases, recognized such taxes as legitimately imposed by the States upon the right of succession. *United States v. Perkins*, 163

A CORRECTION. — In a recent NOTE, II HARVARD LAW REVIEW, 541, it was stated that one Von der Ahe, whose arrest by his bail was in question, was the defendant in an action of debt. This we find to have been error. Von der Ahe was the defendant in an action of malicious prosecution; the case went against him, and he appealed. The bail piece on which he was arrested was issued upon his appeal bond. This correction does not affect the law as stated in our NOTE. — ED.

U. S. 625. The case under discussion would appear, however, to be the first in which a contention has been clearly made and carried up to the Supreme Court of the United States, that such a tax was obnoxious to the Fourteenth Amendment of the Federal Constitution. The appellants apparently despaired of convincing the court that the tax would deprive them of their property without due process of law, but insisted that it was in conflict with the clause forbidding the States to deny to any citizen the equal protection of the laws. The court, in an extremely well written opinion by Mr. Justice McKenna, returns the answer that might have been expected. The phrase "equal protection of the laws" is so evidently intended to be indefinite that the court has never attempted to fix its meaning. They have often declared, however, that almost no classification of persons for purposes of taxation can be held to interfere with this provision of the Constitution, so long as all within a class are treated alike. Only a discrimination obviously based on grounds wholly foreign to the proper ends of government could be held unconstitutional. In the Illinois Inheritance Tax Law, as in all other similar laws, there is a classification which seriously affects the operation of the tax; the division depending in the first place on the degree of relationship of the legatee to the testator, and secondly, on the amount of the legacy. The division rests in the first case on obvious natural grounds, and in the second case on economic principles long recognized in the tax laws of every country. This decision of the Supreme Court, it may be hoped, will finally settle the validity of all such laws under the Federal Constitution; while the line of reasoning pursued in the opinion may tend to dissuade State courts from a narrow construction of restraints imposed by State constitutions upon the power of taxation.

CHARITABLE INSTITUTIONS AND THE RULE OF RESPONDEAT SUPERIOR.

— In carrying on the functions of government, it is often needful to delegate to boards of individuals some portion of the governmental power. Such boards, in the absence of personal neglect, are not answerable for the faults of the servants they officially employ. The reason given is that the servants also become agents of the government. Non-governmental corporations engaged in rendering gratuitous services to the public, in view of their essentially public character, were at first regarded as falling under the class of governmental boards. *Holiday v. St. Leonards*, 11 C. B. N. S. 192. Later cases, however, notably *Mersey Docks Trustees v. Gibbs et al.*, 11 H. L. 686, have settled the law for England that only corporations with strictly governmental powers are to be exempt from this liability. American courts have generally held that charitable corporations were not liable. The first cases followed *Holiday v. St. Leonards*, *supra*, and treated charitable corporations as governmental corporations. But the reasoning of the later English cases soon led them to abandon this position, and they now base their decisions on the ground of a distinct exception to the rule of *respondeat superior*. *Hearns v. Waterbury Hospital*, 66 Ct. 98. See 9 HARVARD LAW REVIEW, 541. The last case on the point is *Ward v. St. Vincent's Hospital*, 52 N. Y. Sup. 466. Here the corporation was a public charitable institution, which did no business for profit, and which devoted the sums received from the patients who wished to pay, to the current expenses. The plaintiff was a pay patient, and was severely burned through the negligence of a nurse. The court

held that as the hospital had used due care in the selection of the nurse they were not answerable for the plaintiff's injury.

This decision seems correct on principle as well as on authority. As a general rule it is unjust to make a man who is personally free from fault answerable for the torts of another. The rule that makes a master liable for the torts of a servant appears to have but one justification that can stand the test of reason, namely, that as the master receives all the incidental benefits of his servant's labor he should also bear the incidental burdens. However well this may apply in the ordinary cases of agency, the justification seems wanting in a case like the present, where the real beneficiaries are the patients and not the corporation. As a practical matter it may be said also that unless the strongest reason demands it, the courts should not cripple the beneficent work of such institutions by forcing them to pay damages. Holding them liable when their trustees are personally blameless will not only work an injury to the public directly, but will have an appreciable effect in the future in discouraging donations. Damages granted against corporations are notoriously large, and charitable persons will refuse to give if they are led to believe that their money will eventually go to pay undeserved judgments and lawyers' fees.

A LIMITATION UPON THE TRANS-MISSOURI FREIGHT DECISION. — In the decision of the Trans-Missouri Freight Case one loophole was left by which to escape the sweeping rule that all contracts in restraint of trade, even if reasonable, are void under the Trust Act of 1890. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. "A contract," said Mr. Justice Peckham, "which is the mere accompaniment of a sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which is in effect collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question." Acting upon this dictum, the court in a recent New York case, in the Appellate Division of the Supreme Court, found the statute inapplicable to a case arising out of the following facts. The plaintiff had contracted with the defendant, for valuable consideration, to convey to him for a limited period his goodwill in the business of freighting the Haiti Packets and vessels for Port-au-Prince, agreeing not to solicit freight or to compete in the business during the term. The plaintiff now sued for the first three months' instalments of the purchase money, alleging performance on his part. The defendant contended that the plaintiff's agreement not to compete, although at common law it would have been binding as a reasonable restraint, was void under the Trust Act of 1890; and that this vitiated the whole contract. The court, however, decided that since the agreement in question was merely collateral to the sale of the goodwill, it was therefore valid. *Brett v. Esel*, New York Law Journal, May 13, 1898.

The decision of the New York court is salutary, and the court were certainly justified in making use of any reasonable loophole afforded by the United States Supreme Court. The reason of that loophole, however, is more in doubt. It is true, as Mr. Justice Peckham points out, that most of the contracts partially in restraint of trade that have been allowed have been collateral to transfers of property; but the courts in those cases would have been rather surprised if they were told that they could

not have decided as they did if the contracts in question, although reasonable, had not been incidental to sales of property. They considered the fact of the sales only as shedding light upon the reasonableness of the transactions. *Green v. Price*, 13 M. & W. 695, 698. It can hardly be seriously supposed that the distinction taken had any further existence at common law; and if it has any validity in the present connection it must be by construction of the statute. It is hard to see why the fact that the agreement is collateral to a sale of property should place it beyond the operation of the statute. If that element, however, has the effect claimed, it may further be questioned whether it was present in the principal case; for by the better view a sale of goodwill is not a sale of property. Goodwill is property only by a figure of speech, and when the plaintiff here sold his goodwill he really did no more than bind himself to place the defendant in a position where he might benefit from all the combined circumstances of the business which the plaintiff had organized. The agreement not to compete was then merely incidental to an affirmative contract to place the defendant in the plaintiff's shoes, and was not collateral to a transfer of property. It was incidental to a transaction which resulted in something valuable to each party; and the Federal Supreme Court might, perhaps, extend their rule to cover the present case. But few contracts do not result in something valuable to each party; and shall the rule be extended so as to sanction all contracts in reasonable restraint of trade when they are collateral to contracts which are, from a pecuniary standpoint, valuable to the parties? The line is not easy to draw in applying a rule based upon reasoning which is metaphysical at best. One feels inclined, however, to support the decision in the principal case because of the necessity of limiting the operation of the *Trans-Missouri* decision to cases where the facts are directly parallel; and the New York court may well have been right in holding that the Trust Act was aimed directly against combinations and monopolies, and did not apply to cases like the present where the element of combination did not exist.

THE RIGHT TO A BENEFIT. — It is characteristic of the growth of the law that a case of first impression is often of more value for the conclusion reached than for the hypothesis upon which it proceeds. So it is in *Keernan v. Metropolitan Construction Co.*, 49 N. E. Rep. 648 (Mass.); one accepts the result in some doubt as to the nature of the right involved. The facts are somewhat curious. The defendant company was using a fire hydrant under a right to supply its engine in the construction of sewers. A fire broke out in the plaintiff's house, and the defendant's servants for a time forcibly prevented the use of the hydrant by the fire department of the city. For the damage resulting to the plaintiff from the delay so caused the Massachusetts court holds the defendant liable.

To determine the character of the plaintiff's right is a matter of much difficulty. It is well recognized that the plaintiff has no enforceable right against a public corporation to have public servants extinguish her fire, for the function is governmental. *Springfield Fire Ins. Co. v. Keeseville*, 148 N. Y. 46. To support the decision, however, the principal case recognizes a less tangible right to have firemen get water if they choose to do so, in order to put out a fire in the plaintiff's house. Precise analogies to the right thus defined do not appear. It is possible that this right to have the unobstructed use of water from a public system of supply may

be like the right to the use of public highways ; but this analogy involves the recognition of a right, not often considered, to have other people come to you upon a highway if they will. *Benjamin v. Storn*, L. R. P. C. 407. If it fall within this class of public rights, the private action in the principal case well lies ; for the damage suffered is different in kind, and not simply in degree, from that suffered by the community in general. *Dantzer v. I. U. Ry. Co.*, 39 N. E. Rep. 223 (Ind.).

If a final basis is sought for the right recognized in the principal case, the interesting speculation arises whether there may not be a broad right to enter into such beneficial relations and to receive such temporal benefits as would accrue in an undisturbed course of events. The infringement of such a right must, upon authority, be considered to consist in an act tortious *per se*, directed against a third party, *prima facie* a tort against him only, and preventing him from entering into beneficial relations with the plaintiff. *Tarleton v. M'Gauley*, 1 Peake, N. P. C. 270. A notable example of such a right to enter into beneficial relations would seem to be the right to trade urged so insistently to-day. This appears to have no other true basis. Moreover, the principal case involves not a private benefit, but a public benefit. The courts may well hold that an obstruction to the conferring of such a public benefit due from a governmental body to one of its members is actionable when they might deny such a right in a private benefit ; for the right to such a public benefit may be considered as existing though it is not enforceable. But upon the whole, does not the principal case at all events appear to require, as fundamental in the law of torts, the recognition of so broad a right as that to receive a benefit?

INJUNCTION AND SPECIFIC PERFORMANCE. — Contracts of actors and theatrical companies have furnished abundant material for the development of the rules governing injunctions and specific performance ; this is as true to-day as in the days of Kean. An important case recently arose in Chicago, in which not the actors but the theatre refused to perform ; and the manager of the Black Crook Company sought an injunction against the manager of the Alhambra Theatre. *Welly v. Jacobs*, 49 N. E. Rep. 723 (Ill.). There was a bilateral contract between the two parties. The terms of the plaintiff's contract are immaterial except in so far as he agreed to furnish his company to act for seven stated nights, and also to furnish certain printing ten days in advance. The defendant agreed to furnish the theatre with equipments, attendants, house programmes, and innumerable other small matters. Before the day for the first performance, the plaintiff had furnished his printing as agreed ; but the defendant had let the theatre to another company. The plaintiff thereupon asked for an injunction restraining the defendant, in effect, from hindering the plaintiff's company in making use of the theatre, from using, or allowing any other company to use, the theatre during the seven days, and from "refusing to furnish" the plaintiff with all the things contracted for. The bill, it must be confessed, was most ingeniously framed ; and the lower court granted the injunction. The Supreme Court of Illinois, however, on reviewing the case, supports the appellate court in the view that the injunction was improper.

The decision of the Supreme Court is admirable in its discussion of the principles of equity ; and its conclusion cannot be doubted. The case raises the question, among others, to what extent a court of equity will

enforce a part of a person's contract when it cannot specifically enforce the whole. It is a rule that unless the terms of an agreement are distinct and independent, equity will not enforce one term without enforcing all. *Kemble v. Kean*, 6 Sim. 333. The famous case of *Lumley v. Wagner*, 1 DeG., M. & G. 604, relied upon by the present plaintiff, is not really inconsistent with the rule stated; for the express negative term which was there enforced, the agreement of an opera singer not to sing during a certain period for any one but the plaintiff, was dealt with as independent of the positive agreement to sing for the plaintiff; and those who attempt to support that case must first take the step of holding the negative agreement independent. When the rule is applied to the principal case, it is clear that the affirmative part of the defendant's contract could not have been enforced, because of the impossibility of the court's supervising performance. The negative terms, therefore, — one of them, by the way, being negative only in form, and by a clever subterfuge, — could not consistently with the rule have been enforced unless independent. Independent they can hardly be, for they were not expressed in the contract, and exist merely by implication from the positive terms. Their very existence by implication seems unjustifiable; but if they are implied, they must depend absolutely upon the affirmative terms from which they are inferred. *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. Since they are dependent, the argument based upon *Lumley v. Wagner*, *supra*, had no application to them, and they could not properly have been enforced unless the case falls within the further rule that when the affirmative part of a contract is unbroken and in a fair way to be performed, equity will enforce the negative part on the assurance that the whole will then be performed. The case, however, is not within that rule; for although the affirmative part of the defendant's contract was as yet unbroken at the time of the filing of the bill, the court had no assurance that it would not be broken, and had no means of preventing the breach. The injunction, therefore, was rightly refused. Great hardship might otherwise have been inflicted upon the defendant; for after the negative injunction had tied his hands and prevented him from making a profit from any other party, the plaintiff might have held him for full damages in an action at law for breach of the affirmative part of the contract, and the injunction would serve no purpose in mitigation of damages. Such injustice equity will not countenance.

LOCUS PŒNITENTIÆ OF A TRUSTEE. — Whether a trustee who, in collusion with a third person, has wrongfully conveyed the trust-res, may repent and bring a bill for the recovery of the property, is a problem which on theory may well admit of different solutions. The question often arises in respect to the Statute of Limitations, where the grantee, to whom the trustee has wrongfully conveyed, holds for the statutory period; is the trustee barred by the statute, as well as the *cestui que trusts* who were under disabilities at the time the conveyance was made? An answer in the affirmative was given in a recent Kentucky case on the principle that as the trustee might at any time during the statutory period have recovered the property in equity, he is barred, and what bars the trustee bars the *cestui*. *Willson v. Louisville Trust Co.*, 44 S. W. Rep. 121 (Ky.).

The suggestion at once presents itself that a trustee who has committed a breach of trust should not be permitted to recover the property, but that the grantee with notice be made a constructive trustee for the original *cestui que trust*, until a new trustee be appointed by the court. It is often said in decisions that the trustee files the bill solely in his representative capacity; but was it not in his representative capacity that he committed the breach of trust? "It is the duty of the trustee to repair his breach of trust;" yes, if the *cestui* files a bill against him for compensation; but does not justice demand in protection of the *cestui* that administration of the trust cannot be claimed as of right by one who has proved himself incapable of administration, and that the property be put into safer and more worthy hands? It is true that if the grantee give back the property to the original trustee the latter's duties revive; but this is very different from saying that such a wrongdoer may of right demand administration again. And if on the view of holding the grantee with notice a constructive trustee for the original *cestui*, the grantee would be liable for giving back the property to the original trustee, such a logical result does not seem too harsh. It may be futile, however, at the present date to deny that the wrongful trustee has a *locus pœnitentiæ*, and by a bill in equity may get back the trust property, which doctrine seems now well settled by authority. *Wetmore v. Porter*, 92 N. Y. 76.

If the view above taken were accepted, the principle advocated in *Willson v. Louisville Trust Co.* could not stand, for the original trustee simply dropping out, the statute would not run in favor of the constructive trustee while the *cestuis* were under disabilities. But even if *Wetmore v. Porter* be supported, it is still difficult to follow the reasoning of the Kentucky case on this point. The action which the original trustee would bring to recover the trust-res being in equity, even if the statutory period has run equity will not follow the analogy of the statute where it would work manifest injustice. It is questionable, then, if, in this case, equity should bar the *cestui que trusts* who were young infants or not yet born when the wrongful conveyance was made.

SPONTANEOUS COMBUSTION IN MARINE INSURANCE. — There have been few decided cases on the question of recovery on a marine insurance policy against fire and the perils of the sea for loss by spontaneous combustion. It seems to be well settled, however, that in such case the owner of the goods insured is barred the recovery of his insurance on the principle that spontaneous combustion is caused by an "inherent vice" in the goods themselves, not by any peril of the sea, and is therefore not within the terms of the policy. *Providence Washington Ins. Co. v. Adler*, 65 Md. 162. But if the owner of the goods is thus precluded from recovery, will the same principle of inherent vice prevent the owner of the vessel from recovering insurance on his freight which he has lost through spontaneous combustion, or a necessary discharge of the goods to prevent such disaster? This question was presented for the first time, it seems, in the recent English case of *The Knight of St. Michael*, [1898] P. 30. When half way through the voyage a part of the cargo of coal on the vessel became so heated as to cause imminent danger of spontaneous combustion, and the captain was obliged to discharge a portion of the cargo at an intermediate port. In an action by the owner of the vessel for the insurance on the freight thus lost to him, the court gave

judgment for the plaintiff. The greater part of the decision is taken up in showing that if the danger of spontaneous combustion was imminent the plaintiff should recover just as if spontaneous combustion had actually occurred; but the question whether the plaintiff could have recovered even if spontaneous combustion had in fact taken place seems scarcely to have been considered or argued. Indeed it was not disputed by defendant's counsel that if fire had actually broken out the plaintiff could recover directly from the defendants. The judge in substance said, "An action by the cargo-owners for insurance on their coal would have been defeated by the doctrine of inherent vice, but the position with regard to the freight was different. If the vessel had continued on her voyage without discharging the coal at Sydney, it was reasonably certain that spontaneous combustion would have ensued and the whole vessel and cargo been destroyed by fire."

It seems difficult to perceive any material difference between an action by the cargo-owners for the insurance on their coal and the action by the ship-owner for the insurance on his freight. In the one case, as in the other, the captain would be obliged to unload in order to save the ship and cargo. True, in the action by the ship-owner the coal with its inherent vice is not furnished by the plaintiff as in the action by the owners of the cargo; but this fact is of no significance, for in both cases the terms of the insurance policy is against loss "by fire, jettisons, and perils of the sea," and the loss due to spontaneous combustion in each case would seem, on the doctrine of inherent vice, not to be covered by these terms. In this view, then, even if the coal had been actually destroyed by spontaneous combustion, the owner of the vessel should not have recovered insurance on his freight, and therefore he should not recover, further than in general average, for any loss incurred to prevent spontaneous combustion.

A PLEDGE WITHOUT TRANSFER OF POSSESSION. — The essential element of a pledge is doubtless the handing over of the possession to the pledgee; and strictly, when this possession is given up, the pledge terminates. Nevertheless, it is settled that if the pledgor regains possession by force, the pledge remains valid, on the fiction that the pledgor has not recovered his old possession, but has stolen the possession of the pledgee, and is holding, not as pledgor, but as thief. By an extension of this theory of changed capacity, it is now law that the pledgee may voluntarily intrust his possession to the pledgor as his agent for a temporary purpose, and still retain his lien. The Supreme Court of Kansas has recently taken a step further in the case of *Matthewson v. Caldwell*, 52 Pac. Rep. 104 (Kan. Sup. Ct.). The defendant in that case purchased a claim against the bank, and the bank agreed to pledge certain negotiable paper for its payment. The bank officers produced the paper in the presence of the defendant; and then, without actually transferring the physical possession, they agreed on behalf of the bank to accept it as a deposit from the defendant and to hold it for her as her agent. During this agency, the bank examiner made his rounds; and without the knowledge of the defendant the bank officials produced the pledged paper as bank assets, and were duly credited therewith. Subsequently the bank failed. The creditors claimed the pledged paper; but the court held, first, that the pledge was valid; and, second, that there was no estoppel on the part of the defendant to deny the ownership of the bank.

The decision of the Court seems correct. Granting that possession as agent is not possession as pledgor when the intrusting is temporary, the possessions seem exactly as distinct when the intrusting is permanent; and there appears to be no way to distinguish the cases on principle. Story, Bailment, § 299; Jones, Pledge, §§ 40-44. The fact that there was no transfer of physical possession is immaterial; for the possession of the pledge after giving the property to the agent is constructive, and a constructive possession may clearly be raised by words alone. Examples of this are found in the cases under the Statute of Frauds, where an agreement by the seller to hold as agent for the buyer is held to constitute "actual receipt" by the buyer; and the case of the warehouseman agreeing to hold for a stranger instead of for the bailor. Again, the Supreme Court of Massachusetts, in the case of *Macomber v. Parker*, 14 Pick. 497, has held in a very able opinion that the owner of a brickyard can make a pledge of his bricks, valid as against his creditors, by agreeing to hold as agent for the pledgee, though no physical possession passes. These authorities, therefore, seem amply to justify the court in the principal case in the decision that there was a valid pledge without actual transfer of possession.

The second point arose on the contention of the creditors that the defendant was estopped to deny the ownership of the bank. It does not appear, however, that the creditors even heard of the paper before the failure; neither does it appear that they were influenced in the slightest degree by the fraud practised on the bank examiners. Therefore, as they never, to their detriment, acted on the implied representation that ownership was in the bank, the court was correct in holding that there was no ground for an estoppel.

GREAT AMERICAN JUDGES — SUPREME COURT OF THE UNITED STATES. — A far different country from the one which called Marshall to be Chief Justice was the one which called Taney to succeed Marshall, in 1836. And the man was different. Roger Brooke Taney was a native of Maryland. His first school was a log cabin, but he eventually gained a second-rate college education. A year of fox-hunting followed, and then he settled down to the law. Taney was not physically strong; he showed muscular weakness, and, though tall, was inclined to stoop; but underneath was strong vitality and a firm will. A powerful sense of duty carried him through a laborious and useful life. His success at the bar was immediate; yet he had his difficulties to meet. His timidity was painful, and was never wholly thrown aside. This forced him to discipline himself in a manner which perhaps led to the self-control which became a marked trait in him; and although he was a man of strong feelings, he seldom betrayed them except in his voice and in his eyes. In politics Taney was originally a Federalist; but upon the disintegration of parties after the war of 1812 he became a supporter of Jackson. Against his own inclinations he accepted the position of attorney-general in Jackson's cabinet, and was a full believer in the President's measures. The contest with the National Bank followed. Taney was made secretary of the treasury, and removed the public deposits from the bank, as Jackson wished. For this action he was much abused; but sentiment changed sufficiently to permit his appointment as Chief Justice of the Supreme Court of the United States in 1836. His appointment was no error; he was a great judge. The theory of the Con-

stitution began to change; States were allowed a broader police power; the control of interstate commerce was held not to be exclusive in Congress, and in the absence of federal legislation States were allowed to act. Chancellor Kent and Story were indeed disturbed; but the Chief Justice drew the line firmly and allowed no dangerous intrusion upon the powers of Congress. Upon circuit his services were valuable; he was dignified, courteous, practical. In a case once for the infringement of a copyright in a song, he had a witness sworn to sing to the jury the two songs in question, while he gravely suppressed the merriment in the court-room. His manner was kindly, though he seems to have lacked a sense of humor. In spite of his ability, however, Taney was several times, to say the least, impolitic. As often happens, integrity became stubbornness; and he would carry out his views with a logical severity which was often ill-timed and unnecessary. One instance of this failing has been already noted, the removal of the public funds from the National Bank; another instance was his opinion in the Dred Scott Case. But though his acts in these cases were ill-advised and unbalanced, they were never corrupt; his integrity was morbidly severe. Taney's last years were saddened by his conflict with the executive at the outbreak of the Civil War, when he felt that the Constitution was being set at naught. But there again his distorted constitutional views of the slavery question seemed to pervert his judgment; and while his theory in regard to the suspension of the writ of *habeas corpus* was right, he misapplied it; and placed his court in an undignified position by asserting its authority over the military forces at the seat of war and attempting to punish military authorities for contempt. Yet on most of the questions under the Constitution few men ever have added so much to our law as Taney.

While Taney was Chief Justice a vacancy occurred on the bench in 1851. To fill this vacancy President Fillmore appointed Benjamin Robbins Curtis of Massachusetts. He was a graduate of Harvard College, a cultivated man, and although hardly a scholar outside the sphere of the law, in the highest sense a gentleman. His study of law began at the Harvard Law School, where he had the benefit of Story's lectures. Without finishing his course there, however, he began practice at Northfield, Massachusetts. Soon he removed to Boston, and rapidly rose in the Suffolk bar. His success was due to the accuracy and range of his knowledge and to the clearness of his statement and argument. He was never eloquent, but a fine presence gave weight to his words. Curtis was a strong man and independent, but so even-tempered and poised that he was never driven from his strictly judicial state of mind. One of his greatest works was the report which he wrote for the Commission of the Massachusetts Legislature, in 1851, upon reforming the procedure of the courts then in vogue. This report was practically embodied in the Practice Act, and the event has proved the quality of the work; for while under the New York Code the New York reports are full of cases on the pleadings, a pleading case is almost unknown in the Supreme Court of Massachusetts. When appointed Associate Justice of the Supreme Court at Washington, Curtis was well chosen in view of the troubled times that followed the compromise of 1850. All of his calmness and independence was put to the test. The Dred Scott case contrasted Curtis and the Chief Justice, much to the advantage of the former. Curtis's dissenting opinion is a model of legal reasoning, and convincing; the Chief Justice missed his mark by committing himself upon the constitutionality of the

Missouri compromise after he had already decided that the court had no jurisdiction over the case, — a kind of dictum never justifiable, highly injudicious in the existing state of politics, and doubly unfortunate in view of the fact that for once in his life Taney was fundamentally mistaken. Curtis kept above the excitement; the Chief Justice in his conscientious support of his own beliefs doggedly allowed his opinions to carry him beyond the case before him. Letters passed between the two in which Taney was decidedly crusty, Curtis always calm and dignified. Not long after this decision Curtis resigned from the bench, the small salary being insufficient for his needs. During the remainder of his life he was the leader of the Boston bar. In the winter of 1872-3 he gave a short course of lectures at the Harvard Law School. When President Johnson was impeached Curtis defended him and procured his acquittal, and afterwards when the President offered him the position of attorney-general he declined the office. Throughout his life honors had little attraction for him; he gave himself calmly and disinterestedly to the higher pursuit of the law.

RECENT CASES.

AGENCY — HIRING OUT SERVANTS. — Defendants, having many workmen in their employ, including plaintiff, hired them out to a contractor engaged in repairing a building. The latter took entire charge of them, but paid their wages to defendants, together with a bonus. Defendants later gratuitously loaned him some appliances to be used in the work. By reason of defects which defendants ought to have known about, but did not, plaintiff was injured. *Held*, that defendants are not liable. *Gagnon v. Dana*, 39 Atl. Rep. 982 (N. H.).

There are several cases which hold that where a master temporarily puts his servants entirely under the directions of an independent contractor, whether gratuitously or for hire, he ceases to be liable for their conduct, even though they continue to draw their wages from him. *Murray v. Currie*, L. R. 6 C. P. 24; *Murphey v. Caralli*, 3 H. & C. 462; *Wood v. Cobb*, 13 Allen, 58. There is more doubt who is responsible where property is hired out with the servants which they are to manage. *Laugher v. Pointer*, 5 B. & C. 547. The general rule applied in the cases first cited is founded in good sense, and its application, as in the principal case, to release the former master from his duty to the servants to furnish safe appliances, is demanded by logic and justice.

AGENCY — PARTIES TO A PROMISSORY NOTE. — A promissory note payable to the order of a bank was indorsed by the cashier in the form: "A. B., Cashier." *Held*, that the indorsee can maintain an action against the bank on the note. *Arnold v. Swenson*, 44 S. W. Rep. 870 (Tex., Civ. App.).

In the indorsement or making of a bill or note by an agent, it is the general rule that the name of the principal shall appear. It must also be indicated that the agent acted in behalf of the principal. *Rice v. Gove*, 22 Pick. 158. This rule arises from the negotiable character of bills and notes. They pass from hand to hand, and must not be ambiguous. The principal case illustrates an exception to this rule, and is, on grounds of expediency, settled law. By commercial understanding banks are known to carry on business in the names of their cashiers. The cashier's name is in fact an *alias* for the bank. *Bank of State of N. Y. v. Muskingum, etc. Bank*, 29 N. Y. 619. It seems, however, that no decision has yet gone so far as to hold effectual a signature in the name of the cashier without some designation of his office. 1 Morse, Banks, § 158.

AGENCY — RESPONDEAT SUPERIOR. — *Held*, that a public charitable hospital which does no business for profit is not liable for the negligence of its servants, provided it has used due care in their selection. *Ward v. St. Vincent's Hospital*, 52 N. Y. Supp. 466 (Sup. Ct., Trial Term, Part Four). See NOTES.

BILLS AND NOTES — OVERDUE PAPER. — The holder of paper payable to order discounted it with plaintiffs before maturity, but by mistake failed to indorse it. After maturity he indorsed it. *Held*, that plaintiffs, although they took without actual notice, are subject to equitable defences available against their indorser. *Lyons, Potter, & Co. v. First Nat. Bank*, 85 Fed. Rep. 120 (C. C. A., Eighth Cir.).

The reasoning of the court is plain. Before the indorsement plaintiffs had only the rights of assignees of an ordinary chose in action, and the indorsement after maturity would not cut off equities. Against this it may be argued with some force that the rule that previous equities are available against the indorsee of overdue paper is based on the fact that there is something suspicious in such a transaction, which ought to put the indorsee upon his guard, but that the reason for this rule entirely fails where the indorsee had before maturity acquired all the beneficial interest in the bill or note. *Watkins v. Maule*, 2 Jac. & W. 237, 244. See also *Grimm v. Warner*, 45 Iowa, 106. The great majority of courts, however, have not accepted this argument, but have held that the rule as to overdue paper, whatever its origin, is not now dependent on any theory of constructive notice, and is subject to no exceptions. *Haskell v. Mitchell*, 53 Me. 468; *Lancaster Bank v. Taylor*, 100 Mass. 18.

CONFLICT OF LAWS — MARRIED WOMEN — CHANGE OF DOMICILE. — A Frenchman and a Frenchwoman married in France. By the law of France, property acquired by the husband is community property. They afterwards changed their domicile to England, where the husband acquired a large fortune and died leaving a will, his wife surviving. *Held*, that the property is governed by French law, and the widow is entitled to one-half. *De Nichols v. Curlier*, [1898] 1 Ch. 403.

While it is the rule that property acquired ante-marriage is governed by the law of the matrimonial domicile, *Harral v. Harral*, 39 N. J. Eq. 279, it should be equally clear that the law of the place where the property is acquired after marriage governs its acquisition. In the principal case the husband acquired the property in England, where there is no law giving the wife an equal share. Under what law the parties were married appears to be immaterial. The decision departs from the sound rule that the effect of a transaction is governed by the law of the place where the transaction took effect. The opposite and apparently correct result has been reached in America. *Saul v. His Creditors*, 5 Mart. N. s. 569.

CONSTITUTIONAL LAW — CITIZENSHIP. — The defendant was born in California of Chinese parents there domiciled. He had returned to China and was refused readmission to the United States. *Held*, that as he was born subject to the jurisdiction of the United States, he is a citizen by the Fourteenth Amendment, and should be admitted. *United States v. Wong Kin Ark*, 18 Sup. Ct. Rep. 456. See NOTES, 12 HARV. LAW REV. 55.

CONSTITUTIONAL LAW — DELEGATION OF TAXING POWER. — A statute provided that in case of a vacancy in the local office, or failure of the local authorities of an incorporated town to levy taxes for schools, health, etc., the governor should appoint three residents of such town to levy such taxes as they deemed expedient for the above purposes. *Held*, that the statute is unconstitutional, as it is a delegation of the taxing power, which the legislature can delegate only to municipal bodies. *Inhabitants of Bernards v. Allen*, 39 Atl. Rep. 716 (N. J., C. A.).

The court rests its decision on "fundamental principles of constitutional law," and not on any peculiarity of the New Jersey Constitution. The authorities most relied on are three New Jersey cases, two of which decided that the municipal body to which the taxing power had been delegated could not itself delegate the power. The third case decided that the legislature could not impose the legislative function of taxation on the courts. These cases do not support the proposition that the legislature itself can only delegate its power in one way. It is commonly said that legislative power cannot be delegated. This is very vague, however, and in the absence of a special constitutional provision, it is hard to see by what authority a court can limit the power of the legislature to delegate its powers if the legislature keeps within the bounds of a reasonable exercise of its discretion. If the delegation of power cannot itself be reasonably called legislation, but amounts to a shirking of the duty of legislation, it would of course be bad. Tested in this way, the statute in the principal case could hardly be declared invalid. The question might be affected, however, by the view which a court held as to the general legislative power over municipal corporations. See *Bulkeley v. Williams*, 68 Conn. 131, and *Le Roy v. Hurlbut*, 24 Mich. 44.

CONSTITUTIONAL LAW — EMINENT DOMAIN — ADDITIONAL SERVITUDE. — *Held*, that an electric passenger railway, running on the highways through country towns,

imposes an additional burden on such highways, so as to require the consent of the abutting owners and compensation. *Zehren v. Milwaukee Electric Ry. Co.*, 74 N. W. Rep. 538 (Wis.).

The court say, that even conceding that the building of an electric road through city streets would not be an additional servitude, its construction on country highways would be. In *Bloomfield & Rochester Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, the court suggested that a distinction might properly be drawn between laying gas pipes in city streets and laying them in country roads. Whatever may be the validity of the distinction in that case, it seems not to apply in the principal case. Country highways are as much subject to the right of passage as are city streets. On the general question see 12 HARV. LAW REV. 61.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — STATE REGULATION OF FREIGHT RATES. — A Nebraska statute prescribed by schedule such rates to be charged by railroads within the State, that the railroads represented by the appellees would have been forced to operate virtually without profit. *Held*, that the statute is invalid, depriving the companies of their property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. *Smyth v. Ames*, *Smyth v. Smith*, *Smyth v. Higginson*, 18 Sup. Ct. Rep. 418. See NOTES, 12 HARV. LAW REV. 50.

CONTRACTS — ASSIGNMENT OF WAGES. — A workman employed as a moulder assigned all the wages he would earn in a year from the company for which he was then working. He left the employ of the company for two months and then returned. *Held*, that wages earned after his return do not pass by the assignment. *O'Keefe v. Allen*, 39 Atl. Rep. 752 (R. I.).

The decision is based on the ground that there were two contracts of employment, and the assignment could not be effectual as to the second contract, for it would be the assignment of a mere possibility. This line of reasoning would apply to the whole assignment. The assignor was not employed for a year. He was at liberty to leave and was subject to discharge at any time. Under these circumstances the assignment at best would seem to be that of a possibility, but the case illustrates the common law antipathy to transactions of this character. The assignment ought to be effectual in equity, however, on the same principle that an equity attaches to after-acquired property under an equitable mortgage. If this is true, there is no insuperable objection to giving effect to it at law, as courts of law are now very liberal in protecting and giving effect to equitable assignments.

CONTRACTS — ASSUMPTION OF MORTGAGE DEBT. — Land was mortgaged to the plaintiff to secure a debt of \$15,000. The mortgagor afterwards conveyed to the defendant, who promised to pay \$10,000 of the mortgage debt, the mortgagor agreeing to hold him harmless as to the rest. The plaintiff sued and recovered the \$10,000. *Held*, that he may still foreclose the mortgage. *Knapp v. Connecticut, etc. Co.*, 85 Fed. Rep. 329 (C. C. A., Eighth Cir.).

The reasons given for allowing a stranger to a contract to sue upon it are as many as there are decisions. In no jurisdiction, however, is the stranger considered a party to the contract. Hence there was no merit in the defendant's contention that the plaintiff, by suing, became bound by the mortgagor's promise to the defendant. Hariman, *Contracts*, 223. Indeed, it is the better doctrine that the mortgagee's right against the grantee, in this class of cases, does not rest upon this anomalous doctrine of contracts. By assuming the mortgage debt the grantee puts the mortgagor in possession of a new asset. The mortgagee, as a creditor of the mortgagor, is entitled to the benefit of this asset, and may reach it by a bill in equity. This additional right is independent of the one which the mortgagee already has against the land, and the latter is not released by the enforcement of the former. *Keller v. Ashford*, 133 U. S. 610.

CONTRACTS — RESTRAINT OF TRADE. — The defendant sold his business and goodwill to the plaintiff, and covenanted not to engage in the same business anywhere in the United States for twenty-five years. *Held*, that the covenant is against public policy and is void. *Luskin Rule Co. v. Fringels*, 49 N. E. Rep. 1030 (Ohio).

This case is *contra* to the current of modern decisions. It was formerly the law that a covenant in restraint of trade unlimited in space was void; *Mitchel v. Reynolds*, 1 P. Wms. 181; but changed conditions in business have required a modification of this rule, and it is now the prevailing doctrine that even a covenant unlimited in space may be enforced if it is reasonable, and no wider than is necessary to protect the interests of the covenantee. *Nordenfelt v. Maxim, etc. Co.*, [1894] App. Cas. 535; *Diamond Match Co. v. Roebert*, 106 N. Y. 473; *Cokdale, etc. Co. v. Garst*, 18 R. I. 484. The

modern tendency of the law is to allow freedom of contract in business transactions. If the buyer of a good-will requires unlimited space for the reasonable protection of what he has purchased, it is a sensible doctrine that the public is not injured if the seller is obliged to perform a contract which he has deliberately made and for which he has received adequate compensation. See 4 HARV. LAW REV. 128.

CRIMINAL LAW — COMPOUNDING A MISDEMEANOR. — The defendant was indicted for receiving money in return for a promise not to prosecute an offender against the liquor statutes. *Held*, that this is an indictable offence. *State v. Carver*, 39 Atl. Rep. 973 (N. H.).

Some confusion has existed on the question as to what misdemeanors the common law allowed to be compounded. It has been said that the composition of any misdemeanor, unless allowed by statute, is illegal. *Partridge v. Hood*, 120 Mass. 403. The English decisions, although not entirely consistent, do not support so broad a rule. *Fallowes v. Taylor*, 7 T. R. 475; *Kier v. Leeman*, 9 Q. B. 371. The court in the principal case appears to take the proper distinction. If the misdemeanor is of a very low grade, or if it is essentially in the nature of a private injury, its composition is of too little importance for the law to notice. However, if the offence is of a public nature, the public is sufficiently interested in the punishment of the offender to make the compounding indictable. 1 Bish., Cr. L., § 711; *Geier v. Leeman*, 109 Pa. St. 180. The principal case seems to have been correctly regarded as falling under the latter head.

DAMAGES — PARENT AND CHILD — PROSPECTIVE DAMAGES. — The two-year-old son of plaintiff was killed by the negligence of defendant. *Held*, that plaintiff can recover for his trouble and expense in caring for and burying the child, but cannot recover for prospective loss of services. *Southern Ry. Co. v. Covenia*, 29 S. E. Rep. 219 (Ga.).

The case follows what seems to be the settled rule in Georgia that no recovery can be had for prospective services, at least unless the child is capable of rendering services at the time of its death. *Allen v. Atlanta St. R. R. Co.*, 54 Ga. 503. New York and the majority of American courts hold that the parent is entitled to prospective damages although the child is too young to render service. *Cuming v. Brooklyn City R. R. Co.*, 109 N. Y. 95. The English decisions, on the other hand, overlook the parental relation entirely, and found an action for injury to a minor exclusively upon loss of service, and the parent has no action even for expenses incurred unless the child is old enough to render services. The New York rule would seem to be the true one, as the parent is entitled to the services of the child until his majority, and this should be taken into consideration in assessing damages.

EQUITY — ASSIGNMENT OF A CHOSE IN ACTION. — A non-negotiable chose in action was subject to an equity in favor of A, who was not one of the parties to the obligation. *Held*, that an assignee of the chose in action for value and without notice takes it discharged from the equity. *Williams v. Donnelly*, 74 N. W. Rep. 601 (Neb.).

The authorities are in hopeless conflict on the question. The decisions *contra* confuse defences available by a party to the obligation with equities attaching thereto in favor of an outsider. *Ames v. Richardson*, 29 Minn. 330. An assignee can have no greater rights against the promisor than his assignor had. However, an assignee secures a legal right to bring an action in the name of his assignor. 3 HARV. LAW REV. 340, 341. The assignor cannot interfere, the transfer being complete. Therefore if the assignee has acted in good faith, he should acquire the right discharged from all equities except those which the promisor may plead in defence. *Starr v. Haskins*, 26 N. J. Eq. 414. The same principle is illustrated by *Dodds v. Hills*, 2 Hem. & M. 424. There a trustee of stock gave a power of attorney to a *bona fide* purchaser to secure a transfer of the stock on the books of the company. It was held, notwithstanding the objection of the *cestui que trust*, that the transfer might be made by the purchaser.

EQUITY — EQUITABLE MORTGAGES. — A trust deed purported to convey land as security for indorsements to be made by the *cestui que trust* named therein. The name of the grantee, the trustee, was omitted from the deed. In reliance on the deed the *cestui que trust* made the indorsements and was charged on them. *Held*, that, although the deed is inoperative at law, it is enforceable by the *cestui que trust* as an equitable mortgage. *Dulany v. Willis*, 29 S. E. Rep. 324 (Va.).

The deed was invalid at law because of the omission of the name of the grantee. However, it was apparent on the face of the deed that the grantor intended that this specific piece of property should operate as security for the valuable consideration which was advanced by the *cestui que trust*. In such a case there is an equitable mort-

gage, creating a lien on the property. Equity will not allow the transaction to fail, but will give effect to the manifest intention of the parties. In accord with the principal case is *Burnside v. Wayman*, 49 Mo. 356. Similar relief has been granted where a deed was left unsealed by mistake. *Dunn v. Raley*, 58. Mo. 134.

EQUITY — INJUNCTION TO RESTRAIN BREACH OF CONTRACT. — The plaintiff and the defendant were parties to a bi-lateral contract, the plaintiff agreeing to furnish his theatrical troop to act at the defendant's theatre for seven stated nights, and to furnish certain printing in advance; the defendant agreeing to furnish the theatre with equipments, attendants, house programmes, etc. The plaintiff furnished the printing, and was ready to perform the rest of his contract; but the defendant let the theatre to another party. On the plaintiff's application the lower court issued an injunction restraining the defendant, in effect, from hindering the plaintiff's company from making use of the theatre, from using, or allowing any other company to use, the theatre during the seven days, and from "refusing to furnish" the plaintiff with everything contracted for. *Held*, that the injunction was improper. *Welty v. Jacobs*, 49 N. E. Rep. 723 (Ill.). SEE NOTES.

EVIDENCE — TRIAL OF FACT WITHOUT A JURY. — *Held*, that the admission of improper evidence in a case tried without a jury is not a ground for reversal. *Bell v. Walker*, 74 N. W. Rep. 617 (Neb.).

The decision is in conformity with settled Nebraska authority, holding that the admission of immaterial and incompetent evidence in a trial without a jury is not reversible error if enough material and competent evidence was admitted to sustain the finding of the court. *Whipple v. Fowler*, 42 Neb. 675; *Willard v. Foster*, 24 Neb. 213. There is a dearth of authority on the precise point. The jury system is primarily responsible for the English law of evidence. The jury being an untrained and unskilled tribunal, it was necessary to lay down rules of exclusion which would result in presenting a clear and definite issue of fact; it was also necessary to exclude other evidence from consideration on account of the danger that it would be misused. The reasons for these excluding rules are not applicable when the court alone determines questions of fact, and the decision in the principal case commends itself strongly. The authorities, however, are probably *contra*. *Begg v. Whittier*, 48 Me. 314; *Hopkins v. Forsyth*, 14 Pa. St. 34; *Hilliard*, *New Trials*, § 40.

EVIDENCE — WILLS — DECLARATIONS AS TO UNDUE INFLUENCE. — *Held*, where a will is contested on the grounds of undue influence, a declaration by the testator, two days after making the will, that his wife and son made it, is admissible to show the mental capacity of the testator. *Ball v. Kane*, 39 Atl. Rep. 778 (Pa.). One judge dissenting.

It is a generally accepted rule of evidence that where undue influence is in issue, the mental capacity of the testator may be proved by his declarations subsequent to the making of the will. *Waterman v. Whitney*, 11 N. Y. 157. The majority of the court were of the opinion that the testator's declaration was admissible under this rule. But it seems that the evidence should have been rejected on the ground taken by the dissenting judge, that this declaration of the testator had no tendency to prove his mental capacity. And even though it be conceded that the declaration raises an inference as to his mental condition, the inference is too slight and conjectural to afford a ground for admitting the evidence, especially as there is great danger of the jury using it as proof of the fact of undue influence.

GARNISHMENT — RIGHTS UNDER A CONTRACT. — The defendant contracted with A to saw logs furnished by A for one year, payment by monthly instalments. After part performance, A was cited as garnishee in an execution issued against the defendant. *Held*, that such attachment covered all the claims of the defendant which might accrue under the contract as well as those already existing. *Fay & Egan Co. v. Ouachita, etc. Mills*, 25 So. Rep. 312 (La.).

The authorities draw a distinction between actual debts and possible future indebtedness. The former, including present debts payable in the future, are held subject to attachment under garnishment process, and the latter are excluded from its operation. *Balt. & O. R. R. Co. v. Gallahue's Admrs.*, 14 Grat. 563; *Coburn v. City of Hartford*, 38 Conn. 290; *Otis v. Ford*, 54 Me. 104. There can be no doubt that such is the correct interpretation of the statutes on this subject. In the principal case the court disregarded this distinction. The contingent future advantage to accrue to the defendant under the operation of the contract was in no sense a debt, and therefore should not have been reached by a garnishment process. Such, indeed, is the rule laid down in an earlier Louisiana case. *Maduel v. Mousseaux*, 29 La. Ann. 228.

INSURANCE. — ACCIDENTAL CAUSE OF DEATH. — *Held*, that where blood poisoning results from an abrasion of the skin of a toe by a new shoe, and death follows, the death is properly attributable to "bodily injuries effected by external, violent, and accidental means," within the meaning of an accident policy. *Western Commercial Travellers' Ass'n v. Smith*, 85 Fed. Rep. 401 (C. C. A., Eighth Cir.).

The decision turns upon the meaning given to the word "accidental." While the authorities clearly show that the word "accident" in an insurance policy is given a different signification from that in which it is commonly used, no entirely satisfactory definition of an accident has yet been found. A number of the better definitions are collected in *Lovelace v. Travellers' etc. Ass'n*, 126 Mo. 104. Perhaps the most definite conclusion that can be gathered from the decisions is that an injury is accidental when produced by some unforeseen, unintended, and violent agency. A case which naturally invites comparison with the principal one is *Baron v. U. S. Mutual Accident Ass'n*, 123 N. Y. 304, where it was held that death resulting from a malignant pustule, caused by contact with diseased animal matter, was not accidental. The finding of the court that the pustule was a disease, excludes the idea of a violent agency, and seems to be sufficient to distinguish the cases.

LEGAL TENDER — MUTILATED NOTE. — The plaintiff presented in payment of car fare a note, from the corner of which a piece about an inch square had been torn. The conductor refused the mutilated note and, upon the refusal of the plaintiff to make further payment, ejected him from the car. *Held*, that the railroad company is not liable in an action for damages for the ejection. *North Hudson County R. R. v. Anderson*, 39 Atl. Rep. 905 (N. J., C. A.).

The case rests on the ground that while a mutilated note may, by the rules of the Treasury Department, be redeemable, the holder of such a note cannot cast upon one, unwilling to assume it, the burden of applying for its redemption. This is a sensible decision, and is distinguishable from the case of *New Jersey, etc. R. R. Co. v. Morgan*, 52 N. J. Law, 60, which was relied upon by the plaintiff. In that case a coin considerably worn, but still distinguishable as a coin which had been issued from the mint, was held to be a legal tender. The cases may be distinguished on the ground that the coin presented all the indicia of money, while the mutilated note did not.

MARINE INSURANCE — SPONTANEOUS COMBUSTION. — *Held*, that an owner of a vessel cannot recover insurance on his freight against loss by fire and perils of the sea, when the captain of the vessel was obliged to discharge part of the cargo of coal because of imminent danger of spontaneous combustion. *The Knight of St. Michael*, [1898] P. 30. See NOTES.

PERSONS — GUARDIAN DE SON TORT — PURCHASE OF WARD'S LAND. — One who, without legal appointment, assumed to act as a guardian to a person *non compos mentis*, purchased at a tax sale land belonging to the ward. *Held*, that he acquired no beneficial interest therein. *Town of Thornton v. Gilman*, 39 Atl. Rep. 900 (N. H.).

The case falls within the principle that whoever assumes to act as a fiduciary incurs all of the burdens and incapacities pertaining to a *de jure* occupant of the position. *Perry, Trusts*, § 245; *Schouler, Domestic Relations*, § 326. The application of this doctrine to guardians is well recognized, although cases upon the point are rare enough to be interesting. A more familiar instance is that of the executor *de son tort*. Of course, a guardian legally appointed would not be allowed to compete with the interests of the ward by purchasing the latter's land at a tax sale. The present decision, therefore, follows inevitably from the general principle as above stated.

PERSONS — MARRIED WOMEN — ALIENATION OF HUSBAND'S AFFECTIONS. — *Held*, where by statute a married woman is given the right to bring actions in her own name, she may maintain an action against one who wrongfully induces her husband to leave her. *Gererd v. Gererd*, 39 Atl. Rep. 884 (Del.).

The case affords a striking illustration of the way in which the harsh and unreasonable rule of the common law relating to married women has been swept away by courts and legislatures. A different decision, however, has been reached in several of the jurisdictions where the tendency in general is to place a strict construction upon the statutes enlarging the rights of married women. *Duffies v. Duffies*, 76 Wis. 374. The more reasonable view and that supported by the great weight of authority, is in accord with the principal case. *Cooley, Torts*, 2d ed. 228. The injury resulting from the alienation of affections is the same whether it affects the husband or the wife, and all that stood between the wife and her right of action at common law was the legal fiction that the husband and wife are one. Where a statute removes the disability which is founded upon this fiction, there seems to be no satisfactory reason against allowing the action.

PLEDGE — NEGOTIABLE PAPER. — A bank made a pledge of negotiable paper, which it agreed to hold as agent for the pledgee. There was no actual transfer of possession. *Held*, that the pledge is valid even as against creditors of the bank. *Matthauson v. Caldwell*, 52 Pac. Rep. 104 (Kan., Sup. Ct.). See NOTES.

PROCEDURE — VERDICTS — SEPARATION OF JURY. — By consent of the prisoner and prosecuting attorney and by direction of the court, the jury gave to their foreman a sealed verdict, and separated for several hours before returning this verdict. *Held*, that this is reversible error. *State v. Mason*, 52 Pac. Rep. 525 (Wash.).

The practice as to the separation of jurors after sealing a verdict differs in this country. If such separation is by consent of parties or direction of the court, it is almost universally held unobjectionable in civil cases. In only a few jurisdictions is it allowable in criminal cases, under any circumstances. As a sealed verdict cannot be changed, and permission to separate is conducive of promptness in the rendition of verdicts, it seems that such permission, in the discretion of the court, should be allowed in criminal cases. *State v. Engles*, 13 Ohio, 490; *Sanders v. State*, 2 Iowa, 230.

PROPERTY — CHATTEL MORTGAGE — RIGHTS OF ASSIGNEE. — A gave a chattel mortgage to B, and later one on the same property to C, the latter agreeing with B that B's mortgage should have priority. C, however, filed his first and immediately assigned it to D, a *bona fide* purchaser for value. *Held*, that B has a first lien as against D. *David Stevenson Brewing Co. v. Iba*, 49 N. E. Rep. 677 (N. Y.).

The fact that this question arises in New York shows the persistent opposition of the legal profession to the New York doctrine as to latent equities, namely, that an assignee of a chose in action takes it subject not only to equities in favor of the obligor and subsequent parties, but also to those in favor of outsiders. The doctrine is wrong on principle, but seems firmly established in New York. *Greene v. Warnick*, 64 N. Y. 220. The principal case carries the application of it to an unfortunate extreme. The court cites in support of its ruling *Decker v. Boice*, 83 N. Y. 215, but the passage referred to is only a *dictum*, and moreover is founded on the special provisions of the statute as to the recording of conveyances of real estate. Under any reasonable interpretation of the statute requiring the filing of chattel mortgages, B's mortgage, being unrecorded, would be wholly void as to D, and to give effect to the agreement between B and D is to provide a very easy method of evading the registry laws.

PROPERTY — COMMON-LAW COPYRIGHT. — *Held*, the distribution of a book among the public generally, or those who choose to subscribe for it under certain terms, though it is not sold but only let for a term under restrictions as to its use, amounts to such a publication as will deprive the author of his common-law right of literary property in its contents. *Jewellers' Mercantile Agency v. Jewellers' Weekly Publishing Co.*, 49 N. E. Rep. 872 (N. Y.).

PROPERTY — DEEDS — DELIVERY — TRUSTS. — A deed sought to convey property to A on certain trusts. The deed was sealed and recorded, but there was no further evidence of delivery. The trustee never accepted the trust. *Held*, that the beneficiary cannot enforce the deed against the grantor or his representatives. *Loring v. Hildreth*, 49 N. E. Rep. 652 (Mass.).

According to the settled law of Massachusetts, the fact of recording is not conclusive evidence of delivery. *Maynard v. Maynard*, 10 Mass. 456. Consequently, the deed was at law a nullity, and the grantor was never divested of his title. The case, therefore, was very properly treated as falling within the principle that equity will not compel a donor to complete an imperfect gift. If, however, the court had found a valid delivery, the trust should have been enforced against the grantor, notwithstanding the trustee's disclaimer. *Adams v. Adams*, 21 Wall. 185. The distinction is that where the deed is properly delivered, the title rests immediately in the trustee without acceptance and even without his knowledge. A perfect trust having been thus created, it will not be allowed to fail even though the trustee by his disclaimer thrusts the title back on the grantor.

PROPERTY — EQUITABLE CONVERSION — RESULTING TRUSTS. — Land was devised to X upon trust to sell and to divide the proceeds between testator's two children. One of the latter died during the lifetime of the testator. *Held*, that the lapsed share of the deceased child results to the heir of the testator and not to his next of kin. *In re Rudy's Estate*, 39 Atl. Rep. 968 (Pa.).

The case is undoubtedly law, and is simply a reiteration of the doctrine of *Ackroyd v. Smithson*, 1 Bro. C. C. 503. Ever since that leading case, it has been uniformly held that where the purposes of a conversion partially fail, the trust results to the heir or next of kin according to the nature of the property in its unconverted condition.

Nowadays the question is not so frequently raised in the United States because of the prevalence of statutes assimilating intestate succession in the cases of real and personal estate.

PROPERTY—FIXTURES—MORTGAGOR AND MORTGAGEE.—A executed a mortgage to plaintiff on a factory and the machinery therein, but it was filed as a real-estate mortgage only. A became bankrupt, and the plaintiff sued to foreclose against defendant, A's assignee. *Held*, that the mortgage operated as a chattel mortgage on the machinery, and being unrecorded is void as to creditors of the mortgagor. *Sheldon v. Wickham*, 50 N. Y. Supp. 314 (Sup. Ct. App. Div., Third Dept.). Two judges dissenting.

The majority of the court felt bound by *Stephens v. Perrine*, 143 N. Y. 476; but this case only decided that the failure to file a chattel mortgage renders it void as to creditors. The court in the principal case assumed that the machinery was personal property as between mortgagor and mortgagee. This may be open to doubt. The law in England is certainly the other way, *Holland v. Hodgson*, L. R. 7 C. P. 328, and the English view has generally been followed in this country. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57. In Massachusetts, however, the decisions seem to agree with the principal case. *Gale v. Ward*, 14 Mass. 352; but see *Pierce v. George*, 108 Mass. 78. The machinery in question seems to have the essential qualities of a fixture, and it is difficult to see how the case can be supported.

PROPERTY—POWERS.—A testator devised his estate to his widow for life, with power to sell or dispose of it for her support. She did not exercise the power. *Held*, that the estate is not liable for debts incurred by her for her support. *Ryon v. Mahan*, 39 Atl. Rep. 893 (R. I.).

The case is clearly right. It bears some points of resemblance to the leading case of *Jones v. Cifton*, 101 U. S. 225. In that case a husband gave several parcels of land to his wife, reserving to himself a general power of appointment. It was held that this power was not available to his creditors. Powers are purely personal, and while a power may make the donee potentially dominus of the property, he cannot be compelled to exercise it. If he fails to do so, creditors have nothing to which they can attach a claim.

PROPERTY—PRESCRIPTION—EMINENT DOMAIN.—A railroad entered upon and occupied land without the owner's consent. In an action of ejectment by the owner, *held*, that as the company could obtain a right of way by virtue of its right of eminent domain, it could not acquire such an easement by prescription, even though its original entry was not in the exercise of its right of eminent domain. *Narron v. Wilmington & W. R. R. Co.*, 29 S. E. Rep. 356 (N. C.).

The ground of decision is apparently that the possession of the company was not adverse. It is held generally that a railroad company entering on land without the owner's consent, or without the proper exercise of its charter privileges, is a trespasser. 2 Wood, Railroads, § 247. There seems to be no reason, therefore, why its possession should not be considered adverse so as to give title if continued for a sufficient time. There appears to be no authority on the point, however.

TORTS—LIBEL PER SE.—The defendant company falsely published of the plaintiff: "The General's bride is a dashing blonde, said to have been a concert-hall singer and dancer at Coney Island." It was alleged and proved that these were places of notoriously evil resort. *Held*, that the imputation is libellous per se. *Gates v. N. Y. Recorder Co.*, 49 N. E. Rep. 769 (N. Y.). See NOTES, 12 HARV. LAW REV. 57.

TORTS—NEGLIGENCE—PLAINTIFF'S ILLEGAL ACT.—The deceased, while travelling on Sunday in violation of a statute forbidding travel on that day, was killed at a crossing by the negligent operation of the defendant's train. In an action by the next of kin, *held*, that the violation of the statute by the deceased is no bar to the recovery. *Boyd v. Fitchburg R. R. Co.*, 39 Atl. Rep. 771 (Vt.).

The decision is supported by the weight of authority in this country, and seems to represent the correct view. The mere fact that a person is travelling on a day when travel is illegal cannot be said to contribute in any degree as the cause of damage resulting from the negligence of another. *Sutton v. Town of Wauwatosa*, 29 Wis. 21.

TORTS—OBSTRUCTION OF HYDRANT.—*Held*, that one who obstructs the use of a city hydrant by firemen is liable to one whose property is damaged by fire in consequence thereof. *Kiernan v. Metropolitan Construction Co.*, 49 N. E. Rep. 648 (Mass.). See NOTES.

TRUSTS—CESTUI BARRED BY THE STATUTE OF LIMITATIONS.—The trustee wrongfully conveyed the trust property, and the grantee with notice held for the

statutory period. *Held*, that as the trustee is barred from recovering the property in equity by analogy to the Statute of Limitations, so are the *cestuis que trust* barred, though they were infants or not yet born at the time of the wrongful conveyance. *Willson v. Louisville Trust Co.*, 44 S. W. Rep. 121 (Ky.). See NOTES.

TRUSTS — DEDICATION FOR PUBLIC USE — PARTIES. — Land was conveyed by deed to the selectmen of a town for use as a public park only. A bill in equity was brought by the grantor to restrain the erection of a school building upon the lot. *Held*, that such a use is inconsistent with the terms of the trust and the bill will lie. *Rownee v. Pierce*, 23 So. Rep. 307 (Miss.).

If land is dedicated to public use without a deed, it is the general doctrine that the dedicatory grants an easement only. He retains the soil for every purpose not inconsistent with the public easement, and may maintain appropriate actions for any encroachment upon it. *St. Mary's v. Jacobs*, L. R. 7 Q. B. 53; *Bliss v. Ball*, 97 Mass. 597. But when the dedicatory parts with the fee it is difficult to see what interest he retains in the land, and as in the case of a charitable trust the Attorney-General would seem to be the proper party to represent the rights of the public. However, as in the principal case, it is generally held that the grantor still has such an interest as to entitle him to enforce the trust as originally declared. *Warren v. Lyons City*, 22 Iowa, 351; *Gilman v. Milwaukee*, 55 Wis. 328.

REVIEWS.

TOWNSHIP AND BOROUGH; being the Ford Lectures delivered in the University of Oxford, 1897. By Frederic William Maitland, LL. D. Cambridge [Eng.]: University Press. 1898.

In these lectures Professor Maitland renews his investigations into the history of boroughs and of the land laws, dealing especially with the legal ownership of the common waste in a borough like Cambridge, which was in no one's lordship. He establishes successfully, with the charm of style no other writer on English law possesses, that one can hardly find ownership in such land apart from the right of users; that the grant of the town of Cambridge by King John to its burgesses did not convey a property right in common or waste; that where aggregate ownership can be predicated one cannot distinguish common from corporate ownership; and that when, in 1803, the common arable fields of Cambridge were to be inclosed, there were really no owners of the balks and waste. As he sums up his thesis, "it is exceedingly hard to disengage those elements of property and rulership which are blent in the medieval *dominium*, and to unravel those strands of corporateness and commonness which are twined in the medieval *communitas*."

These lectures are more than usually full of striking and epigrammatic suggestions. Of the fiction — if, as he doubts, it is a fiction — of corporate ownership, the author truly says that we must not regard the fiction as the work of lawyers. "The lawyer is not the motive force, but the drag on the wheel, and must protest that the layman is (if you please) 'feigning' more rapidly than the law will allow. It is not the lawyer, but the man of business, who makes the mercantile firm into a person distinct from the sum of the partners. It is the layman who complains that the club cannot get its club-house without 'some lawyer's nonsense about trustees.'" "Law sees differences of kind where nature has made differences of degree." "Explorations in foreign climes may often tell us what to look for, but never what to find." "The man who is reaping his acre-strip will be able to enjoy some of the forthcoming bread and beer;

but not all of it; the king will come round for his share. The king has a right . . . call it governmental, call it proprietary, call it what you will, it ends in bread and beer; and that is where the cultivator's right ends."

This is good reading and good thinking. If any one deem it baseless conjecture, brilliantly expressed, let him look at the Appendix. This occupies more than half the book, and records a patient and exhaustive investigation into the history of the Cambridge fields and houses from Domesday to this century, with a few careful notes on the history and institutions of the borough. Professor Maitland's thought is clear and his style graceful because he has made his investigation and formed his conclusions before he has attempted to write his book.

J. H. B.

A TREATISE ON THE LAW OF NEGLIGENCE. In two volumes. By Thomas G. Shearman and Amasa A. Redfield. Fifth edition. Substantially rewritten. New York: Baker, Voorhis, & Co. 1898. pp. ccii, 1,427.

This work requires no general introduction; and the reviewer's attention is now to be confined mainly to the changes and additions which appear in the fifth edition. Negligence so pervades the different branches of the law that any treatment of it must be rather disjointed. The same general principles, however, run through the subject; and by setting forth these principles in the first chapter and following them throughout, the authors avoid the error of making a mere collection of authorities. This preliminary is clearly and acutely written, although it is believed that complexity would have been avoided if, instead of three degrees of care, simply due care under all the circumstances had been used as a basis. Accuracy of definition avoids much of the danger caused by this complexity. But the preliminary statement of principle is little changed from the fourth edition, and hence is not directly under consideration.

From 1,429 pages of the fourth edition the two volumes have now reached a total of 1,629 pages. Some sections are altered, some entirely rewritten; and a very complete collection is made of cases decided, even during the last year, on almost every conceivable point or diversity. The late cases are, as a rule, carefully classified, although occasionally a case is not given its full significance. *Spade v. Lynn & Boston R. R. Co.*, 168 Mass. 285, for instance, — a case decided hardly more than twelve months ago, — is the first case cited as showing that damages cannot be recovered for mental suffering negligently caused; whereas in fact the case was the second in America to raise the doubtful question whether damages can be recovered for actual physical injury resulting from mental shock. The rule laid down by the court, that there can be no recovery for such an injury, by no means follows from the rule discussed in the text; yet this further question is not touched upon. This oversight, however, is exceptional, and the references are generally well made.

The chief alteration in the present edition is in the treatment of that exception to the fellow-servant rule known as the "Vice-Principal" doctrine. Such a doctrine, the authors state, has become generally accepted since the publication of the last edition. This statement at first reading is startling; and although it is modified by careful definition so that the word "vice-principal" assumes a meaning not generally attributed to it, the statement seems somewhat too broad. Starting with the opinion that such a rule ought to exist, the writers are inclined to take their point of

view too seriously, and seem over eager to spell their rule out of cases which do not necessarily go to the full length. It must be remembered that aside from a vice-principal rule there is another rule imposing upon a master certain duties to his employees which he cannot delegate; and if a master delegates a duty of this sort to a servant who fails to perform it, he is himself liable. The New York rule, which the reader is given to understand has the authors' support, is stated as providing that "a vice-principal is one to whom is deputed the discharge of some duty *or the exercise of some power* which belongs to the master as such." § 231. This definition appears to confuse the two rules just alluded to. So far as the first part of the rule goes, that a master is liable to one servant for the act of another servant who is performing a duty belonging to the master, we agree; he is liable, however, not because his servant is a vice-principal, but because he himself is under a duty the responsibility of which he cannot escape by delegating its performance. McKinney, Fellow-Servants, § 70; Bishop, Non-Contract Law, 665, note. As for the master being further liable for the acts of a servant to whom he has delegated merely his powers, we do not agree. Such a doctrine is not justified by any of the cases cited in New York, where the consideration has always been whether the act of the servant was one which the master was under a duty to do. *Hawkins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416. Although the broader rule once had the sanction of the United States Supreme Court in the "Ross Case," we can hardly agree that later "the 'Baugh Case' inferentially recognizes the rule," § 233, note 2; on the contrary, while the court takes pains to distinguish the former case, it seems "inferentially" to overrule it. The decision in the "Baugh Case" has since been followed by several courts, which have treated it as practically overriding the "Ross Case." 8 HARVARD LAW REVIEW, 57. A few States, it must be admitted, fully support the broader rule; but the rule should not be laid down too sweepingly. Its treatment in the text, moreover, appears to be inconsistent with § 232, note 1, which deals with the master's liability as requiring that the act of the so-called vice-principal should be one which the master is under a duty to do, or else that the master himself be fixed with some personal wrong. That treatment is on principle the better one; and the writers themselves apparently try to make all cases conform to that test. All cases in which the question is raised whether or not a general agent is a vice-principal are dealt with as cases where the principal has delegated the performance of a duty to the agent, the theory being that principals owe a duty of superintendence even in matters of detail. It is doubtful, however, whether the principal ever does owe such a duty, apart from the duty to establish suitable regulations, furnish suitable appliances, and hire competent servants. In the absence of such a duty, when a superintendent is appointed he is ordinarily under a duty simply to his employer, a duty like that of all the other employees; and he is to all intents and purposes their fellow-servant. If this rule ever works injustice, is it not by reason of the inherent evil of fellow-servant rule? The failure to distinguish between the vice-principal rule and the different phases of the rule imposing on masters certain unassignable duties is to be regretted; for a discussion that fails even to notice the distinction can hardly be considered adequate.

It is not intended by these criticisms to disparage the merit of this work of Shearman and Redfield. While we disagree with some of the

positions taken, they are all taken skilfully, and logically developed ; and the work must be recognized as a standard upon the subjects with which it deals.

J. G. P.

THE LAW OF NEGOTIABLE INSTRUMENTS: STATUTES, CASES, AND AUTHORITIES. Edited by Ernest W. Huffcut, Professor of Law in Cornell University College of Law. New York: Baker, Voorhis, & Co. 1898. pp. xvi, 700.

The most important result of the efforts of the American Commissioners on Uniformity of Laws has been the recent enactment in several of our States of the Negotiable Instruments Law, a codification of the law of negotiable paper based upon the English Bills of Exchange Act. Mr. Huffcut's volume is perhaps the most elaborate annotated edition of this statute that has yet appeared. Part I. contains the statute and the English Bills of Exchange Act. The text of the former is accompanied by numerous annotations, including many of the notes made by the draftsman, J. J. Crawford, Esq., as they appeared in the draft printed by the Commissioners. Article I. of Part II. contains selections from various legal writers on such topics as codes governing negotiable paper, the construction of codifying statutes, and the history of the law merchant. In Article II. of Part II. there are about three hundred annotated cases, mostly American, illustrating the provisions of the code, to which there are cross references.

The editor states that his volume is intended primarily for students, and he is undoubtedly right in saying that the importance of the Negotiable Instruments Law, especially in view of its probable enactment in a majority of our States, renders necessary a familiarity with the statute on the part of students. A word of caution, however, might well be given to those intending to use this volume as a text-book ; for, were the student and instructor to rely primarily upon the statute, referring only incidentally to the decisions, instead of using the act merely as supplementary to the reading and discussion of the cases, there would be the danger that the study of the subject might be robbed of its vitality and value. In certain instances, furthermore, the order in which the cases are arranged might perhaps have been improved upon, to bring out more clearly the development of the subject as a whole. While the work is designed chiefly for use by students, the practising lawyer, especially in jurisdictions where the statute has been enacted, will undoubtedly find Mr. Huffcut's book serviceable.

H. D. H.

A TREATISE ON THE MILITARY LAW OF THE UNITED STATES. By George B. Davis, U. S. A. New York: John Wiley & Sons. 1898. pp. xii, 754.

Particularly interesting at this time of our military activity is a comprehensive and clear exposition of the military law of the United States. The writer, whose experience and position well fit him for the task, deals with the sources and authority of our military law ; the constitution, composition, and jurisdiction of courts-martial and their method of procedure ; the articles of war, with a full discussion of each one ; and the forms used in framing the charges and pleas in the several tribunals.

The work is well done. The divisions of subjects and chapters have, as a rule, been clearly arranged ; the discussions are exhaustive, without

being lengthy; while the notes furnish a valuable list of authorities and examples. Exception might be taken perhaps to the author's treatment of the subject of evidence, wherein he makes the bulk of our common law of evidence depend so much on the "best evidence" rule, — a rule that would often carry us too far in its application; and his attempt to base all rules of evidence on logical principles seems to lose sight of the purely historical growth of many of those rules. While there is traced the source and development of our military law from that of England, and in the chapter on the American Articles of War comparison is made with the English Articles, it still seems that a comparison of our system of military law with that of other European nations would have proved both instructive and interesting. Perhaps the author, however, in limiting his work to a volume of convenient size, wisely made his treatment expository and not critical.

S. H.

BOOKS RECEIVED.

INTRODUCTION TO THE STUDY OF THE LAW. By Edwin H. Woodruff. New York: Baker, Voorhis, & Co. 1898.

THE LAW OF NEGOTIABLE INSTRUMENTS. Statutes, Cases, and Authorities. Edited by Ernest W. Huffcut. New York: Baker, Voorhis, & Co. 1898.

A TREATISE ON THE LAW OF NEGLIGENCE. Fifth edition. In two volumes. By Thomas G. Shearman and Amasa A. Redfield. New York: Baker, Voorhis, & Co. 1898.

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NO. 3

DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875.

PART III.¹

BEFORE leaving the subject of discovery in the Court of Chancery, it is proper to call attention to certain changes in the procedure of that court introduced by the statute of 15 and 16 Vict., c. 86. That statute, which came into operation Nov. 2, 1852, was passed in consequence of, and pursuant to, the recommendations of a Royal Commission, appointed Dec. 11, 1850, to inquire into and report upon the process, practice, and system of pleading in the Court of Chancery, with a view to ascertaining whether any and what alterations and amendments could be made therein which would be conducive to the better administration of justice.

Equity Pleading was, therefore, one of the three subjects with which the commissioners were called upon to deal, and it presented a more inviting field for the exercise of their talents than either of the others; for alterations and amendments in the other two were called for chiefly with a view to making the administration of justice cheaper and more speedy, while they were called for in the system of pleading for the purpose of making it better. Nor could the commissioners have been in doubt as to the nature and extent of the alterations and amendments needed in the system of

¹ Continued from page 219 of vol. xi.

pleading, if they would have opened their eyes to the fact that that system was not indigenous to the Court of Chancery, and, therefore, that the standard by which it was to be judged must be sought elsewhere than in that court; for then they could not have failed to see that, while the Court of Chancery was entitled to little credit for the virtues of that system, it was responsible for all or nearly all its vices, and hence that the way to improve it was to make it conform more closely to its prototype.

In the civil and canon law, as has been seen,¹ discovery, while of course it was intimately connected with the pleadings, was nevertheless separated from and independent of them. When the plaintiff in a suit had filed his first pleading, if he wanted discovery from the defendant to aid him in proving it, he filed positions, — which the defendant was required to answer upon oath. If he did not want discovery, he filed no positions, and then there was nothing for the defendant to answer. Meantime the defendant had to consider whether he would set up an affirmative defence. If he decided to do so, he filed a pleading, and then the same questions arose upon that, *mutatis mutandis*, as upon the plaintiff's first pleading; and this process went on until each had pleaded all the facts that he had to plead. If the defendant decided to set up no affirmative defence, he filed no pleading, and so of course the pleadings ended with the plaintiff's first pleadings; and in whatever stage of the series the pleadings ended, they ended because the party whose turn it was to plead did not avail himself of his opportunity.

It will be seen, therefore, that while the filing of pleadings was a right, and had in it no element of duty, the giving of discovery was a duty, and had in it no element of right. Indeed, the giving of discovery was not even a duty which could be voluntarily performed, for a party could not answer by way of discovery unless positions were filed for him to answer; and it seems that this was also true in the English ecclesiastical courts, notwithstanding the fact that in those courts the positions were always incorporated with the pleadings;² for, though the consequence was that the pleadings themselves had to be answered by way of discovery, yet this was done only pursuant to an order of the court, and of course such an order would be made only upon the application of the party whose pleading was to be answered.

¹ See vol. xi. 143-4.

² See vol. xi. 144.

In the Court of Chancery, however, the capital mistake was made from the beginning of uniting discovery indissolubly with the pleadings. The only means by which discovery could ever be obtained in that court was by filing a bill (and thus making one's self plaintiff in a suit) against the person from whom discovery was sought, and thereupon procuring a writ of *subpœna*, and serving it upon the latter, who thus became the defendant in the suit. By the *subpœna* the defendant was required, first, to appear to the bill; secondly, to answer the same (*i. e.*, by way of discovery). Moreover, it was in this way alone that any suit in chancery could be commenced, whatever might be its object, *i. e.*, whether discovery was its sole object, or whether its ultimate object was relief, — to which discovery was thus made an indispensable preliminary; and the reason was that the writ of *subpœna*, under the Great Seal, was the plaintiff's only means of coercing a defendant; and yet, not only was the tenor of that writ fixed and unchangeable, so that a plaintiff could have no option as to what it should require of the defendant, but a plaintiff could not even waive any of its requirements. The result, therefore, was that there could be no discovery without a suit, and no suit without discovery; that discovery was always the second thing required of the defendant, and that nothing else could be had of him until that was obtained. A consequence was that, so long as a defendant could avoid giving discovery, whether by going beyond the jurisdiction, or by keeping himself concealed within the jurisdiction, or even by lying in prison, he could hold the plaintiff completely at bay; or rather he could have done so but for the adoption of certain expedients for the plaintiff's relief, which will be mentioned presently.

Another consequence (which, however, has attracted much more attention in this country than in England) was that a plaintiff, whose only evidence in support of his case (with the exception of such admissions as he might obtain from the defendant by way of discovery) was the testimony of a single unimpeachable witness, could not possibly obtain relief in equity, if any fact necessary to support his claim was positively denied by the defendant's answer. This was because of a rule of evidence borrowed by the Court of Chancery from the canon law, namely, that no fact positively denied by a defendant under oath could be proved against him by the testimony of a single witness, — a rule which derived its sole support from the assumption that the defendant was put upon his oath by the voluntary act of the plaintiff. It seems, more-

over, that the union of discovery with the pleadings was responsible for all the potency, if not for the very existence, of that rule in the Court of Chancery; for, in consequence of that union, a defendant's answer by way of discovery, being a part of the pleadings, was always before the court, though it had not been read in evidence; and, therefore, though a defendant could never read his answer in evidence, yet he could point out the fact that certain allegations in the bill were positively denied by his answer, for the purpose of showing that such allegations could not be proved by the testimony of a single witness. If, however, the answer by way of discovery had not been a part of the pleadings, it would not have been before the court at all unless the plaintiff chose to read it in evidence, and hence the plaintiff could have required an answer by way of discovery in all cases, without incurring any risk of being injured by it, as it would have been at his option, up to the very last moment, whether or not it should be used for any purpose.

Turning now to the case of a defendant, we find that no provision whatever was made for his pleading an affirmative defence, that the answer of a defendant in theory comprised nothing but his examination under oath, by one of the masters of the court, upon the statements, charges, and interrogatories contained in the bill, and yet that it was only by incorporating with his examination by way of discovery any affirmative defence that he might have, that a defendant could avail himself of such defence at all; and hence that the union of pleading and discovery was quite as indissoluble in respect to a defendant as it was in respect to a plaintiff. One consequence was that a defendant always had to swear to the truth of his defence, while a plaintiff was not required to swear to the truth of the case stated in his bill,—an inequality for which there was no justification. Moreover, it is wrong in itself to require a party to swear to the truth of his pleadings, and parties have never been intentionally required to do so in England unless in very exceptional cases. A party may have a perfectly good case or defence, and yet have no personal knowledge whatever of the facts which constitute it, nor even what a conscientious person would regard as any grounds for belief in regard to them. In the case of executors and administrators in particular, this is a matter of daily experience. Least of all should a party be required to swear to his pleadings in a court which, like the Court of Chancery, boasted pre-eminence in giving discovery, and which yet gave it

only to aid a party in *proving* his case or defence,—not to aid him in *stating* it. In the Court of Chancery, *e. g.*, it often happened that a party's chief or sole reliance for proof was upon admissions to be extorted from his adversary; and in every such case, as the pleadings may be only an experiment, there should be great facility of amendment, as there always was in case of a bill; and yet any amendment of a sworn answer in chancery was attended with great difficulty.¹

An incidental consequence to plaintiffs of the indissoluble union of answers by way of defence with answers by way of discovery was, that a defendant could never lose by default the right to set up a defence; that the only default in not answering was in not answering by way of discovery, and the consequence of that default was, not that the defendant lost the right of answering, but that he became liable to process of contempt to compel him to answer. A defendant, therefore, could never lose any right by delaying the putting in of his answer, provided he answered eventually; for, whenever he chose to answer by way of discovery, he had a right, of which the court had no power to deprive him, to answer also by way of defence.

The greatest mischief, however, which was worked by the union of pleading and discovery in the Court of Chancery was to the pleadings themselves, though this was much greater in the case of the answer than it was in the case of the bill. The only additions that ever had to be made to a bill for the sake of discovery were charges and interrogatories, and neither of these interfered seriously with the character of the bill as a pleading. The charges were mere amplifications of the stating part of the bill, *i. e.*, while the latter stated facts, the former stated evidence of those facts; and the interrogatories of course showed on their face what they were, and they could not possibly be mistaken for anything else. With the answer, however, it was far otherwise, for the two elements which that contained were as different from each other as two things could well be, and yet neither of them had any mark by

¹ See 1 Dan. Ch. Pr. (5th ed.) 679–684. “In proceedings upon oath, where there is a clear mistake, an answer has by leave of the court been taken off the file, and a new answer put on it; but Lord Thurlow adopted a better course, not taking the answer off the file, but permitting a sort of supplemental answer to be filed, that course leaving the parties the effect of what had been sworn before, with the explanation given by the supplemental answer.” Per Lord Eldon, in *Dolder v. Bank of England*, 10 Ves. 285. “The former practice was to allow the answer to be amended, but now the course is to put in a supplemental answer.” Per Lord Eldon in *Wells v. Wood*, 10 Ves. 401.

which it could be distinguished from the other with any certainty; and, therefore, their union in one document was the cause of infinite confusion.¹ Moreover, this was an evil which time had no tendency to cure, or even to mitigate; for it was an evil which affected the whole body of suitors, and from which no individual often consciously suffered, and, therefore, it failed to attract the attention of the public. When a plaintiff found it impossible to compel a defendant to answer, and there was a total failure of justice in consequence, the evil was one which could not long be passively endured; and even the necessity of incurring the expense and delay of obtaining an answer, signed and sworn to, from every defendant to a suit in equity (however distant or inaccessible he might be, and though an answer from him by way of discovery could be of no value to the plaintiff, either because no relief was sought against him, and he was made a defendant merely in order that he might be bound by the decree, or because he had no knowledge of the facts of the case), was an evil which was sure to be felt by individual suitors, and was, therefore, likely to excite loud complaints. Accordingly, we find that several expedients were adopted, from time to time, with a view to making it possible to prosecute a suit without any answer at all from a defendant, or without an answer signed and sworn to; but all these expedients were designed merely to meet the particular evil which was felt, and they left the general evils resulting from the unnatural union of discovery and defence untouched and unnoticed.

Thus, with the plaintiff's consent, the court would make an order that the defendant be permitted to file his answer without oath, or even without oath or signature (*i. e.*, that the defendant's solicitor be permitted to file it, without the necessity of communicating with his client). This expedient, of course, was applicable only to friendly suits, as it required the co-operation of both parties. Moreover, an answer was still necessary, notwithstanding such an order, and it still contained, in theory, discovery as well as defence.

¹ For example, it has not been generally perceived that the denials contained in answers are merely by way of discovery, and hence the truth that bills and answers, regarded as pleadings, are wholly affirmative, has not met with general acceptance; and yet the fact that a defendant may be compelled to admit expressly in his answer whatever he cannot deny under oath, and that whatever the defendant does not expressly admit the plaintiff must prove, ought to have reminded any one who needed such a reminder that there are no constructive admissions in equity, and hence that there would be no occasion for any denials in an answer, were it not that the defendant is compelled either to admit or deny by way of discovery.

Again, when a plaintiff had exhausted all the processes of contempt, and still was unable to compel the defendant to answer, the court would, by way of punishing the defendant for his contumacy (*in pœnam contumaciæ*), direct that the bill be taken *pro confesso*, *i. e.*, that the defendant be treated as admitting to be true all the allegations in the bill which were necessary to enable the plaintiff to obtain a decree, and accordingly that the same decree be made against him that would have been made if he had filed an answer actually admitting them to be true. This was undoubtedly a very strong measure, but the court had the authority of the canon law to fall back upon, and it also had a much stronger reason for adopting the measure than the canon law had; for in the latter the only evil suffered by the plaintiff from the defendant's neglect or refusal to answer was the loss of the discovery to which he was entitled, while, in the Court of Chancery, he lost the right to prosecute his suit. At the same time it was a measure which, on account of the delay and expense which it involved, failed to meet the requirements of justice in all that class of cases in which the right to prosecute his suit, and not discovery, was what the plaintiff demanded; and accordingly, with the aid of the legislature, other expedients were adopted during the second quarter of the present century to meet the needs of the class of cases just mentioned. Thus, in 1830, it was provided by statute¹ that if a defendant, on being brought to the bar of the court to answer his contempt in not answering the bill, still refused to answer, the plaintiff might, instead of having the bill taken *pro confesso*, put in an answer in the defendant's name, stating that the defendant left the plaintiff to make such proof as he should be able or be advised to make, and submitting his interest to the court. What strikes one most strongly in this provision is the misplaced tenderness with which it treats the defendant; for not only is it confined to cases in which the defendant is actually before the court, and yet continues to persist in his contempt, but the defendant is given twenty-one days' further time to answer, and even at the expiration of that time the plaintiff is permitted to put in an answer for the defendant only with the leave of the court, to be obtained on ten days' notice to the defendant, in case no good cause be shown to the contrary; and yet, when all is done, the only boon conferred upon the plaintiff is that of being permitted to prosecute his suit, and

¹ 11 Geo. IV. and 1 Wm. IV., c. 36, s. 15, Rule 11.

the only evil inflicted upon the defendant is that of not being permitted longer to obstruct the course of justice.

While the relief thus afforded was better than nothing, it fell very far short of what was required, even to remove the particular evil which plaintiffs suffered from being unable to get their causes at issue, *i. e.*, in a condition in which they could take their testimony.

Eleven years later, a much more effective remedy for this evil was provided by the General Orders of Aug. 26, 1841,¹ having the force of statutes;² for it was declared that, as soon as any defendant incurred the penalties of contempt in not answering the bill, the plaintiff might file a note stating that he intended to proceed with his cause as if the defendant had filed an answer, traversing the case made by the bill, and the plaintiff had replied thereto, and served a *subpœna* to rejoin; and that, such note having been filed, the service of a copy of it upon the defendant should have the same effect as the service of a *subpœna* to rejoin, namely, that of putting the cause completely at issue, and so enabling the parties to proceed to the taking of testimony. The plaintiff was, indeed, required to obtain leave of the court before filing such note; but he was permitted to obtain leave without notice to the defendant, and upon proof that the defendant had incurred the penalties of contempt in not answering. Moreover, the necessity of obtaining leave of court was put an end to the following year.³

The note which was thus permitted to perform the threefold function of an answer, a replication, and a *subpœna* to rejoin, acquired

¹ Orders 21 and 22. See Cr. & Ph. 373-4.

² The General Orders of Aug. 26, 1841, were made under the authority conferred upon the Court of Chancery by 3 & 4 Vict., c. 94 (amended by 4 & 5 Vict., c. 52), which recited that it would greatly contribute to the diminishing of expense and delay in suits in the Court of Chancery if the process, pleadings, and course of proceeding therein were in some respects altered, but that this could not be conveniently done otherwise than by Rules or Orders of the judges of the said court from time to time to be made, and that doubts might arise as to the power of the said judges to make such alterations as might be expedient without the authority of Parliament; and accordingly sect. 1 authorized the Lord Chancellor, with the advice and consent of the Master of the Rolls, and the Vice-Chancellor, or one of them, by rules and orders to make such alterations; and declared that such rules and orders should (subject to certain conditions which need not be stated) be binding and obligatory on the said court, and be of like force and effect as if the provisions contained therein had been expressly enacted by Parliament. This statute initiated a policy which has exerted a momentous influence, for it resulted, thirty-five years later, in the legislature's giving to the courts, as organized by the Judicature Acts, the entire practical control over their own procedure.

³ Namely, by Order 5 of April 11, 1842. See 1 Ph. xv.

the name of "traversing note";¹ it was further regulated by the General Orders of May 8, 1845,² and continued to be a feature of the practice of the court until it was superseded by the Judicature Acts. It must have been a great boon to all those plaintiffs who could not obtain an answer without resorting to the processes of contempt, and who yet did not care enough, either for discovery or for having the bill taken *pro confesso*, to make it worth their while to incur the expense and delay which each involved. And yet it seems odd that it should not have occurred to the authors of the "traversing note" that there must be some very radical vice in a system which required a remedy so circuitous and so artificial for a phenomenon so ordinary as that of a defendant's failing to "plead"; or, if it did occur to them, that, having been clothed by the legislature with ample powers for the purpose, they should not have attempted to discover and cure the vice itself, instead of contenting themselves with dealing merely with one of its manifestations.

It often happened in the Court of Chancery that persons against whom the plaintiff sought no relief, but who might claim that they, and not the plaintiff, were entitled to the relief claimed by the plaintiff, or to some part of it, were required by the court to be made defendants for the protection of the principal defendant, *i. e.*, in order that they might be bound by any decree which the plaintiff might obtain against him. In many of the cases in which such persons were made defendants, they had no thought of concerning themselves with the litigation, and there was, therefore, no good reason why they should even appear to the bill, much less answer it. Accordingly, it was provided by the orders of Aug. 26, 1841,³ that such defendants need not be served with a *subpœna*, but might instead be served with a copy of the bill, omitting the interrogating part, — in which case the bill, as against such defendants, should not pray for a *subpœna*, but should pray that such defendants might be bound by all the proceedings in the cause; that if such defendants, being so served with a copy of the bill, did not appear thereto,

¹ It is hard to say whether equity lawyers or common-law lawyers ought to have been most bewildered by this name and the language of the orders which suggested it, — the former, at finding one of the most technical terms of common-law pleading suddenly introduced into the nomenclature of equity procedure; the latter, at finding the defendant's failure to answer treated as a reason why he should be regarded as having denied the plaintiff's case, instead of a reason why he should be regarded as having admitted it.

² Orders 52-58. See 1 Ph. lxxxviii-xc.

³ Orders 23-29. See Cr. & Ph. 374-7.

the plaintiff might proceed as if they were not parties to the suit, and yet they should be bound by all the proceedings therein; that if they did appear or took any other action in the suit, it should be at their own expense, unless the court should otherwise order; and that any plaintiff who did not avail himself of the foregoing provisions, but prosecuted his suit against such defendants in the ordinary way, should pay all the costs thus occasioned, unless the court should otherwise direct. It will be seen, therefore, that while these provisions, like those previously referred to, were designed to enable plaintiffs to prosecute suits without any answers, or even appearances, from a certain class of defendants, yet that the motive of their authors was not to save plaintiffs from the necessity of obtaining answers from unwilling defendants, but to remove from plaintiffs and defendants alike, in a class of cases in which the costs of all parties were often paid out of an estate or fund which the court was administering, a temptation to incur needless expense. Still, though the evil in this class of cases was different from what it was in those previously referred to, yet it had its root in the same cause; for the reason why a defendant against whom no relief was prayed was always entitled to his costs of appearing and answering, was, that, through no fault of his, he was compelled to appear and answer for the benefit of others, and therefore he was of course entitled to be indemnified for doing so.

The reader will not have failed to remark that, in all the foregoing expedients, the object was to devise means of dispensing, in certain cases, with any answer at all, whether by way of discovery or defence, or with any answer under the oath or even under the signature of the defendant, and that no attempt was made to separate answers by way of discovery from answers by way of defence. The cases, moreover, in which answers could be dispensed with were exceptions, and of comparatively rare occurrence, the rule being that a defendant answered, unless, indeed, he demurred or pleaded. In the cases, therefore, which constituted the rule, there was no change, and hence the evils arising from the inseparability of pleading and discovery had received no mitigation. It seems clear, therefore, that the alteration and amendment in equity pleading which was most imperatively demanded was the removal of those evils, root and branch, by the removal of their cause.

How, then, could the separation of discovery from pleading in the Court of Chancery have been best brought about? In other

words, how could the separation have been made with the least change in other respects, and consequently with the least disturbance and friction? These questions will be best answered by suggesting one or two considerations affecting bills.

It has been seen¹ that a bill in equity, like the pleadings in the ecclesiastical courts, always in theory contained within itself, under the name of charges of evidence, the positions of the civil and canon law, and that discovery in the Court of Chancery, so far as it was of matters within the defendant's personal knowledge, consisted in theory wholly of the answers of the defendant, under oath, to the allegations and charges in the bill. In truth, however, the Court of Chancery never succeeded in naturalizing this foreign mode of extracting discovery. From an early period draughtsmen insisted upon inserting interrogatories also for the defendant to answer, and, though these at first received no recognition from the court, yet they constantly gained ground, while charges of evidence lost ground, until at length it was practically the interrogatories, and not the allegations and charges, that the defendant answered. It is true that every interrogatory had to be founded upon an allegation or charge, but that came to be regarded as a merely technical or arbitrary rule, only the letter of which need be complied with; and, therefore, it was held that an allegation or charge might be materially amplified by an interrogatory.² Hence it became a rule that, while every allegation and charge must be fully answered, every interrogatory, if properly supported by an allegation or charge, must also be fully answered. Moreover, as every bill contained interrogatories, and as the interrogatories always covered all the ground covered by the allegations and charges, and additional ground also, the first part of the above rule became practically inoperative, while the last part was always vital. For example, when an answer was excepted to for insufficiency, the part of the bill which was claimed not to be fully answered was generally, if not always, the interrogating part or some portion of it, — not the stating part or charging part. Lastly, it was provided by the general orders of Aug. 26, 1841,³ that a defendant should not be bound to answer any statement or charge in a bill unless specially and particularly interrogated thereto; that the interrogatories should also be divided from each other and numbered consecutively; and that the inter-

¹ See vol. xi. 208.

² *Ibid.*, note.

³ Orders 16 and 17. See Cr. & Ph. 371-2.

rogatories which each defendant was required to answer should be specified in a note at the foot of the bill, and that no others need be answered; and the effect of this was held to be that a defendant who was not thus required to answer some specified interrogatory or interrogatories, need not answer the bill at all.¹ Only two more steps were necessary, therefore, in order to separate discovery entirely from the bill and to make it optional with the plaintiff whether the defendant should answer by way of discovery or not,—namely, first, to separate the interrogatories from the bill; secondly, to declare that a defendant's answers by way of discovery should be in law, as they were in fact, answers to the interrogatories,—not an answer to the bill. Moreover, these two steps were necessary to complete and round out what had been already done, and there is, therefore, no doubt whatever that they ought to have been taken, assuming that it was desirable to separate discovery from the pleadings; and that, too, quite aside from the question whether interrogatories or positions constitute the better instrument for eliciting discovery, for it was quite too late to change from the former to the latter in the Court of Chancery.

How, then, about separating the defendant's answer by way of discovery from his answer by way of defence? That object would also be already accomplished; for if interrogatories were filed by the plaintiff, the defendant would have to answer them by way of discovery; if none were filed, no discovery would be given; and in either case the *bill* would remain unanswered. If the defendant wished to set up an affirmative defence, of course he would answer the bill by way of defence; otherwise he would have no occasion to answer it at all, and the pleadings would end with the bill.

What incidental effects, if any, would the separation of discovery from the pleadings have had upon the latter? Upon the bill, it would have had the incidental effect of putting an end to all charges of evidence for the purpose of discovery; upon the answer, it would have had the incidental effect of making it unnecessary for the defendant to swear to it; upon pleas and demurrers, it would have had the incidental effect of abolishing them entirely. If the reader is surprised at this last statement, he is requested to bear in mind that pleas and demurrers had only one direct object, namely, that of protecting the defendant from answering by way of discovery. Hence it was that the only effect of allowing a plea

¹ *Hughes v. Lipscombe*, 3 Hare, 341, overruling *Wilson v. Jones*, 12 Sim. 361.

or demurrer was to make it impossible for the plaintiff to compel an answer, and, therefore, impossible for him to proceed with his suit, unless he could get rid of the plea or demurrer by amending his bill. Hence it was that the only effect of overruling a plea or demurrer was that the latter went for nothing, and the defendant was in the same situation as if he had not filed it, *i. e.*, he had to answer. Hence, also, it was that a bill was the only pleading to which a plea or demurrer would lie, that being the only pleading which had to be answered by way of discovery.

Would the abolition of pleas and demurrers have been objectionable? Certainly the abolition of pleas would not, for (to the discredit of the judges who had administered them be it said) they had proved a signal failure,¹ and it was too late to attempt to reconstruct them. Whether some other means should be devised for affording that protection to defendants against giving discovery which pleas were designed to afford, would have been an independent question. With demurrers the case was somewhat different; for they served reasonably well the purpose for which they were designed, and they also served the useful indirect purpose of raising the question whether the bill stated a good case, assuming it to be true. But, then, both of these objects could have been accomplished in some other way (as they were in the civil and canon law), *e. g.*, by a motion to take the bill off the file; and this would have had the incidental advantage of being equally applicable to the answer, *i. e.*, the defence.

In what condition, then, would the pleadings as a whole have been left? Subject to two qualifications, they would have become just what the pleadings in the civil and canon law were; namely, a series of affirmative pleadings on each side, continuing until the facts of the case were exhausted. One of the qualifications which must be made to this statement is, as has been already seen,² that the bill would have contained the entire series of the plaintiff's pleadings, as the answer would of the defendant's. The other qualification requires some explanation.

¹ "For the form of a very elaborate and difficult plea, one of the few pleas in the history of pleading that have escaped being overruled, see Appendix, 146." *Drewry on Equity Pleading*, 68. The form referred to is the plea in *Saunders v. Druce*, 3 *Drewry*, 140. While it is true that that plea escaped being overruled by the judge of first instance, yet the plaintiff appealed from the decision allowing the plea; and afterwards by consent the plea was overruled, and the defendant ordered to answer. See 26 *L. T.* 304.

² See vol. xi. 207-8.

No part of the procedure of the Court of Chancery was copied so closely from that of the civil and canon law as the mode of taking testimony. The only intentional departure was the use of interrogatories instead of articles for the direct examination of witnesses, interrogatories being used in the civil and canon law, only in the cross-examination of witnesses. Yet in making that departure the serious blunder was committed of keeping secret, until the taking of testimony was closed, all the interrogatories upon which witnesses were examined, as well those used on the direct examination as those used on the cross-examination. In the civil and canon law, the testimony of witnesses was kept secret until the taking of testimony was closed, lest the disclosure of the testimony, while there was yet an opportunity to call new witnesses or recall old ones, should lead to perjury and subornation of perjury. In respect, however, to the acts of parties, as distinguished from the acts of witnesses, as the keeping of these secret would tend only to defeat the purposes of justice, the civil and canon law required their immediate and full disclosure. To this, however, there was one exception, namely, the interrogatories upon which witnesses were cross-examined; and the reason of it is obvious: witnesses are supposed to be more friendly to the party who calls them than to the adverse party; and hence it is important that they should testify on cross-examination with as little aid as possible from the party who called them, and with as little opportunity as possible to shape their answers with a view to supporting the testimony which they have given on their direct examination, and each of these objects would be defeated if the interrogatories to be put to witnesses on cross-examination were made public before the cross-examination took place. None of these considerations, however, have any application to the direct examination of witnesses, and while there may be good reasons why a party should not know, until the taking of testimony is closed, what testimony the witnesses of the adverse party have given, there is every reason why he should know what testimony they were expected to give, and, therefore, probably have given. Otherwise, he can neither safely and usefully cross-examine, nor know what counter testimony to procure. And yet, in the Court of Chancery, the rule applicable to cross-interrogatories was applied indiscriminately to all interrogatories for the examination of witnesses, the fact being overlooked that the articles of the civil and canon law, and not the interrogatories of that system, were the true analogue of the direct interrogatories

of the Court of Chancery. The consequence was that, prior to the publication of the testimony, the only information to which a litigant was entitled as to the evidence to be adduced by his adversary was the names and places of residence of his witnesses,¹ and such information as the bill and answer respectively contained. The court, therefore, found it necessary to establish the rule that a plaintiff must in his bill, and a defendant in his answer, indicate not only the facts which he expected to prove, but also, to some extent, the evidence by which he expected to prove them, at the risk of having his evidence excluded, on the ground that it had taken the adverse party by surprise; and hence it frequently became necessary to make statements or charges of evidence, not only in the bill, but in the answer, — not only for the sake of discovery, but lest the adverse party should persuade the court that the evidence had taken him by surprise.

As, however, the rule of secrecy was wholly abolished by the statute in question,² the anomaly to which it gave rise might well have been abolished also; and if it had been, and at the same time the union between discovery and pleading had been dissolved, the pleadings in the Court of Chancery would have become precisely what the pleadings in the civil and canon law were, subject to the single qualification that all the plaintiff's pleadings would have been contained in the bill, and all the defendant's in the answer.³

Next, let us see what the commissioners actually did for the improvement of the system of pleading in the Court of Chancery, or rather what the legislature did upon their recommendation. By sect. 10 of 15 & 16 Vict., c. 86, it is enacted (1) that every bill shall contain as concisely as may be a narrative of the material facts, matters, and circumstances upon which the plaintiff relies; (2) that

¹ For greater security the examiner was required to give this information, — not the party calling the witness or his solicitor. Prior to the twenty-fifth Order of April 3, 1828, the examiner was also required to show every witness personally to the adverse party or his representative, in order that the latter might see that the witness was the person whom he purported to be. "Before the witness is examined, he is to be introduced into the Six Clerks' office by the Examiner's clerk, and produced at the seat of the adverse clerk in court, where the Examiner's clerk is to leave a notice in writing of the name and place of residence of every such witness, in order to prevent witnesses from being personated, and to give an opportunity for cross-examination." *Harr. Ch. Pr.* (ed. of 1808) 261. By the Order just referred to, however, it was provided that in future witnesses should not be produced at the seat of the clerk in court for the adverse party, but that the service there of the notice in writing should continue. See 2 *Russ. App.* 12.

² Sect. 31.

³ See *supra*, page 163; vol. xi. 207-8.

such narrative shall be divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation; (3) that the bill shall pray specifically for the relief which the plaintiff conceives himself entitled to, and also for general relief; (4) that the bill shall not contain any interrogatories for the examination of the defendant.

It will be seen that the first three clauses are purely affirmative, while the fourth is purely negative. Of the three affirmative clauses, the second alone makes a change; and that change, moreover, while it brings the bill to that extent into conformity with the pleadings of the civil and canon law,¹ affects it only in its superficial and mechanical aspects. The fourth clause abolishes the interrogating part of the bill, but it remains to be seen what is provided in its place. Nothing is said about charges of evidence, and, therefore, they cannot be abolished; and yet it seems pretty clear that their continued existence was not contemplated. Nor could any one guess, from the language of the section, that the "facts, matters, and circumstances," mentioned in the first clause, might constitute a replication as well as an original case.

By sects. 12 and 13 it is enacted that the defendant shall not be required to answer the bill, unless interrogatories are filed by the plaintiff, within a time to be limited by a general order, and a copy thereof delivered to the defendant; but that the defendant shall be entitled to plead, answer, or demur, whether interrogatories be filed or not.

By sect. 14 it is enacted that the answer may contain not only the defendant's answer to said interrogatories, but such statements material to the case as the defendant may think it necessary or advisable to make, and then a clause is added similar to the second clause in sect. 10. This clearly leaves the answer unchanged in substance, though one would scarcely suspect from the language employed that by "such statements material to the case as the defendant may think it necessary or advisable to make," was meant statements constituting either an affirmative defence or an affirmative rejoinder.

Altogether, the enactments contained in these four sections (10, 12, 13, and 14) are truly remarkable. The hopes excited by the fourth clause of sect. 10 are dashed to the ground by the subsequent sections; for we find, first, that the interrogatories, though

¹ See vol. xi. 143-4.

physically separated from the bill, yet constructively are still a part of it; secondly, that while (as before the act) charges of evidence will do the plaintiff no good, yet the absence of them will be as fatal to his right of discovery as ever; thirdly, that there is still but one answer, and that is an answer to the bill,—not to the interrogatories; fourthly, that discovery and defence are still as inseparable as ever, so that, while (as before the act) there may be neither discovery nor defence, or either without the other, yet if there are both, both must be contained in the same document. What, then, was the gain? The division of the pleadings into numbered paragraphs seems to have been about its sum total; and it is difficult to see what other gain the commissioners could have anticipated. What advantage, for example, could they have supposed would accrue from physically separating the interrogatories from the bill, and making them a part of it again by construction? If a plaintiff wished to indicate by his bill whether or not he required from the defendant an answer by way of discovery, there was already a much more simple and a much better way of doing it.¹ It may be added that when a plaintiff, by his bill, pursuant to an authority vested in him, dispenses with an answer from a defendant by way of discovery, such defendant cannot with any propriety either plead or demur to the bill, since by doing either he will be demanding the judgment of the court upon the question whether he shall be required to answer a bill which he has already been released from answering, *i. e.*, upon a question which has no existence, and a decision of which, therefore, either way will be followed by no consequences; and yet it is expressly enacted, sect. 13, that a defendant may plead, answer, or demur to a bill, whether interrogatories are filed or not, *i. e.*, whether he is required to answer the bill or not.

Upon the whole, it is impossible to say much for the labors of the commission, so far as they related to the system of pleading in the Court of Chancery; and yet of the six equity lawyers on the commission, two afterwards became Lords Chancellors, another Master of the Rolls, two others Lords Justices, and the remaining one a Vice-Chancellor. It ought, however, in justice, to be said that the attention of the commission was chiefly occupied with other things.

It remains to consider briefly two changes made by the same

¹ See *supra*, pages 161-2.

statute respecting the enforcement of discovery, namely, by giving defendants a new method (in addition to the old one) of compelling discovery by plaintiffs, and by giving to both plaintiffs and defendants a new method (in addition to the old one) of compelling the discovery and production of documents by the other.

Prior to the statute, as has been seen,¹ the only method by which a defendant could compel a plaintiff to give discovery was by serving upon him a writ of *subpœna*, and the only way of obtaining a writ of *subpœna* was by filing a bill. In the nature of things, however, neither a writ of *subpœna* nor a bill was necessary, and therefore each of them caused an unnecessary expense, and some unnecessary delay; but these seem to have been the only objections to them. There was no reason, in the case of any bill for discovery, why the interrogatories should be separated from the bill; for, as the bill would be filed for the sake of discovery only, there could not be any question whether the plaintiff would wish to file interrogatories or not. Nor could it be material whether the defendant's answer was to the bill or to interrogatories separated from the bill, as the answer could in no event contain anything but discovery, and so there could be no question of separating discovery from defence. The only thing needed, therefore, was that a defendant should be enabled to interrogate a plaintiff directly upon the allegations in the answer constituting the defence to the bill.

Accordingly, it was enacted by sect. 19 that any defendant might, after sufficiently answering the bill, and without filing any bill for discovery, file interrogatories for the examination of the plaintiff, and deliver a copy thereof to the plaintiff, and that the plaintiff should answer the same as if contained in a bill for discovery. The words "after sufficiently answering the bill" were introduced to preserve a rule which had always existed, namely, that a defendant must give discovery to the plaintiff before receiving discovery from him. The section, however, contains another clause (which shows to how great an extent the commissioners were under the domination of old ideas), namely, to the effect that there should be prefixed to the interrogatories a concise statement of the several subjects upon which discovery was sought. This evidently proceeded upon the idea that, if a bill was not to be filed, a substitute for it must be provided.

In respect to the discovery and production of documents, the

¹ See vol. xi. 216.

reader is reminded that, prior to the statute in question, the discovery of documents was effected in the same manner as any other discovery, while their production was effected by an order made upon motion. Moreover, as an order for production had to specify and describe the documents to be produced, and as it had to be founded exclusively on the admissions in the defendant's answer, it followed that the discovery had to be completed before the first step towards production could be taken. Production, therefore, in general, involved in it no element of discovery; but this was not absolutely true; for it was sometimes impracticable to fix by the order for production the precise limits of the production to be made, and when the precise limits were not fixed by the order, it was necessary that the production should be accompanied by an affidavit showing that the terms of the order were complied with.¹

What, then, was the change made by the statute? Before answering that question, it is necessary to advert to a species of discovery heretofore only incidentally alluded to,² namely, discovery made after the hearing of the cause. The discovery hitherto considered, including the production of documents, is always made before the hearing of the cause, and even before the taking of testimony. In theory, moreover, the discovery which may be thus obtained is all that is needed; for, though it is supposed to be obtained primarily for the purposes of the hearing, yet it may be used for all the purposes of the suit, whether at, or before, or after the hearing; nor can a party refuse to give any particular discovery merely because it will not be needed until after the hearing. Nevertheless, as suits in equity are, comparatively speaking, very complicated, and as they are seldom finally disposed of at the hearing (*i. e.*, at the first hearing), and as the most important part of the litigation frequently takes place after the hearing, it is often found difficult, and even impracticable, for a party to anticipate, before the hearing, all the questions which may arise in the progress of the suit, and before its final termination; and hence it was found to be conducive to justice to permit parties to provide themselves with evidence as the occasion for it arose; and, indeed, the reasons for this indulgence were found to be so strong that a rule, founded upon the highest considerations of policy, was not permitted to stand in its way, namely, the rule that no witnesses

¹ See vol. xi. 212-13.

² See vol. xi. 211.

shall be examined after the testimony is published;¹ and, accordingly, if new testimony was found to be necessary upon questions which arose after the hearing, it was permitted to be taken. *A fortiori*, therefore, if new discovery was needed under similar circumstances, the court enabled the parties respectively to obtain it, no similar rule of policy standing in the way.

It may be added that, when new evidence was needed after the hearing, it was in the Master's office that the occasion for it arose, as it was there that all questions of fact arising after the hearing were, in the first instance, investigated; and it was, therefore, found convenient to arm the Master with power to enforce new discovery. Accordingly, whenever a cause was referred to the Master for a purpose which might involve a trial of questions of fact, the decree (by which the reference was directed) ordered that, "for the better discovery of the matters aforesaid," the parties respectively were to produce before said Master upon oath all deeds, books, papers, and writings in their custody or power relating thereto, and were to be examined upon interrogatories as said Master should direct.² Here, it will be seen, the distinction between discovery and production, *i. e.*, between admissions by parties of facts within their knowledge, and the production by them of documents in their custody or power, is fully preserved. Whether the relative place assigned in the decree to the direction as to the production of documents was meant to indicate that such production should take place before the examination on interrogatories, may not be clear. Certain it is, however, that the former was relatively of much greater importance in the Master's office than at the hearing of the cause. Moreover, the words "produce before said Master upon oath" import that the production is always to be accompanied by an affidavit; and, therefore, economy suggests that such affidavit should be made to serve the purpose which, in the case of documents produced before the hearing, was served by the answer to the bill, especially as an affidavit is quite as convenient for such a purpose as an answer to a general charge or a general interrogatory as to documents. The important part of either is the negative part, *i. e.*, that in which the party swears either that he has no relevant documents, or none except those which he specifies; and, in the case of either, the terms in which this part is expressed must be prescribed. In the case of an answer they are prescribed

¹ See *supra*, pages 163-5; vol. xi. 144.

² Seton on Decrees (1st ed.), 11.

by the charge of documents, and the interrogatory as to documents contained in the bill. In the case of an affidavit they must be prescribed directly by the same authority as that by which the production is ordered; and, as they should be the same in all cases, they may be prescribed once for all by fixing the form of the negative part of the affidavit to be made by every one who is ordered to produce documents. Nor has an answer any advantage over an affidavit in respect to the affirmative part, *i. e.*, the part in which the possession of certain documents is admitted, and the documents are scheduled and described; for, in case of either an answer or an affidavit, the party making it must at his peril see that it is sufficient, *i. e.*, if it is not sufficient, he must make a further answer or affidavit, and also pay costs. Moreover, an affidavit made at the time of production has this advantage over an answer made before production, namely, that the former will always serve every purpose that can be served by the latter, while the converse, as has been seen, is not always true.¹

Accordingly, in the Master's office the common course was for the Master to direct a production of documents by all parties with the usual affidavit, before any interrogatories were brought in. It might happen, however, when the production was made, that the adverse party was not satisfied with it, because he believed that the affidavit which accompanied it, though sufficient upon its face, was either false or failed to disclose the whole truth, and therefore he wished further to probe the conscience of the party making the affidavit; and, in that case, his course was to bring in interrogatories for the latter to answer. These interrogatories would of course be special, being suggested by and adapted to the special circumstances of the case. It will be seen, therefore, that whenever, before the hearing, for the purpose of obtaining further discovery as to documents than is afforded by the answer to the original bill, the plaintiff would amend his bill by inserting a special charge and a special interrogatory as to documents, he should, after the hearing, for the purpose of obtaining further discovery as to documents than is afforded by the usual affidavit, bring into the Master's office special interrogatories as to documents. And it ought to be clearly understood that, while an affidavit as to documents may well supersede an answer to a general charge or general interrogatory as to documents, it cannot at all supersede an answer to a special charge, or to special interroga-

¹ See *supra*, page 169.

tories, whether contained in an original or an amended bill, or, in case of interrogatories, whether contained in a bill or brought into the Master's office.

Such, then, having been the practice before the statute respecting the discovery and production of documents, both before and after the hearing, what changes did the statute make? By sect. 18 it is enacted that the court may, on the plaintiff's application, make an order for the production by any defendant upon oath of such of the documents in his possession or power, relating to the matters in question in the suit, as the court shall think right; and, by sect. 20, a similar provision is made for production by the plaintiff on the application of a defendant. If these sections be read in the light merely of the previous practice as to production before the hearing, their meaning will be found to be obscure and uncertain, but if they be read in the light of the previous practice as to production after the hearing, their meaning becomes clear; for they employ the very terms which decrees had rendered so familiar. Their effect, therefore, was that, of the two methods which had previously been employed for enforcing the discovery and production of documents, namely, one before and one after the hearing, the latter should be available before the hearing as well as after it, so that there should be, before the hearing, a choice of either method. There was, however, one thing lacking to make the new method prescribed by the statute complete, for no provision was made for filing interrogatories; and, therefore, the new or statutory method was left to be supplemented by the old method, so far as regarded the use of interrogatories, *i. e.*, if a party, seeking production under the new method, was not satisfied with the discovery afforded by the affidavit which accompanied the production, he was left to seek further discovery by answer to interrogatories filed under sect. 12 or sect. 19 (as the case might be). And if the interrogatories so filed, and the answers to them, had been made entirely independent of the pleadings, as they might have been made available for every purpose which interrogatories could serve, any further provision for filing interrogatories would have been superfluous; but as the interrogatories authorized to be filed by sect. 12 were made a part of the bill, and as the answers to them must be contained in the answer to the bill, they were not at all adapted to the needs of the new method of enforcing the discovery and production of documents; and it seems, therefore, to have been a misfortune that sects. 18 and 20 did not contain a provision for filing interroga-

tories; for the want of proper facilities for supplementing the discovery obtained by affidavit under those sections was much felt.

Unfortunately, also, the judges upon whom devolved the duty of enforcing the discovery and production of documents under sects. 18 and 20, namely, the Master of the Rolls and the three Vice-Chancellors, did not fully adopt the view which has just been suggested as to the interpretation of those sections. They seem to have supposed that the separation of the discovery from the production, which existed under the old method, must be preserved under the new, and yet they were not prepared to accept the natural consequence of that view, namely, that there must be a separate proceeding for each; and accordingly they decided¹ that discovery and production should be obtained under one order, but that that order should be executed piecemeal, *i. e.*, that discovery should first be made within a time named, and then that production should be made within a further time named. Clearly the statute did not contemplate such an order, and it is not perceived that it could be attended with the smallest advantage over an order directing both to be made at the same time; and it was certainly attended with one serious disadvantage, namely, that it would frequently necessitate the making of a second affidavit at the time of the production.²

The method of obtaining orders for the discovery and production of documents, under sects. 18 and 20, or for production under the old method, received a modification from another important statute,³ passed pursuant to the recommendations of the same commissioners, and which came into operation at the same time as the principal act. Its main object was to abolish the office of Master in Chancery, and to transfer the business transacted by the Masters to the chambers of the Master of the Rolls and the three Vice-Chancellors respectively; but an incidental object was to introduce into the Court of Chancery the common-law distinction between judicial business done in court and that done by a judge out of court, *i. e.*, at the judge's chambers; and, as the distinction itself was borrowed from the common-law courts, so also the mode of proceeding at chambers, namely, by summons and order, was bor-

¹ The decision was made by fixing and announcing the form of order to be made on an application for discovery and production of documents. On the same occasion the judges announced a form of affidavit which would be deemed a compliance with such an order. See *Ordines Cancellaria*, 530; *Rochdale Canal Co. v. King*, 15 Beav. 11.

² See *supra*, page 169.

³ 15 & 16 Vict., c. 80.

rowed from them. Among the items of business also which the statute¹ authorized, at the option of the judges, to be done at chambers, were applications for the discovery or production of documents; and accordingly, a few days after the act went into operation, namely, Nov. 10, 1852, the Master of the Rolls and the three Vice-Chancellors respectively announced² that all such applications must be made at chambers. Consequently, every order for discovery and production under sects. 18 and 20, or for production under the old method, subsequently to Nov. 10, 1852, was obtained by means of a summons issued by the judge to whose court the cause was attached at his chambers, and served upon the adverse party, whereas, previous to the statute in question, all orders of every description had to be obtained by motion in open court. One object in making this change appears to have been to save expense by getting rid of the necessity of employing counsel. This, however, was more a seeming than a real advantage; for the reason why it is not necessary to employ counsel at chambers is that business done there is not supposed to require an argument; and whenever there is to be an argument, counsel must be employed, whether it be in court or in chambers. Moreover, whatever may be the merit, on the score of economy, of a summons from chambers as compared with a motion in open court, nothing can be said on that score for the method introduced by sects. 18 and 20 of ch. 86, as compared with the old method; for the latter did not involve the necessity of making any application to the court, unless there was a contest, and so an argument was required. Indeed, discovery never involved an application to the court, unless exceptions were taken to the answer for insufficiency, and were not submitted to by the defendant; nor did production, unless the defendant refused to produce some of the discovered documents, and the plaintiff insisted upon their production. Under sects. 18 and 20, on the other hand, both discovery and production always had to be obtained under an order, whether there was any contest or not; and though it has been said³ that both were obtained under one order, yet that was only when there was no contest in regard to either, *i. e.*, when the usual affidavit made by the one party, and the production or non-production by him in accordance with it, were acquiesced in by the other party: and in regard to production in particular, the order only required the production of such docu-

¹ Sect. 26.

² For the announcement made by Turner, V. C., see 9 Hare, Appendix, 48, 49.

³ *Supra*, page 173.

ments as the party by his affidavit did not object to producing. As to all others, therefore, a special application had to be made, and of course it involved the employment of counsel on both sides. It would seem, moreover, that discovery and production of documents under sects. 18 and 20, unmodified by ch. 80, would have been more rather than less expensive than under the old method, — more expensive also than it need have been. It is not obvious, for example, why the order just referred to was supposed to be necessary. As the discovery and production which it secured were only such as the party obtaining the order had an absolute right to, a notice from him to the adverse party that he required such discovery and production would seem to have been all that was needed.

By the third order of June 1, 1854,¹ it was provided that the course of proceeding in use as to the production of documents ordered to be produced before the hearing of a cause shall extend and be applicable to the production of documents ordered to be produced after the hearing.

What changes did this rule make in the method of obtaining production of documents after the hearing of a cause? First, it required the affidavit of documents to precede their production instead of being contemporaneous with it; secondly, it took away the right to supplement, by means of interrogatories, the discovery obtained by the affidavit. Both of these changes, moreover, were for the worse. As to the second, this is emphatically true; for, while the rule professed to place production after the hearing on the same footing with production before the hearing, in fact it placed it upon a much worse footing, as it was not possible for a party after the hearing, to supplement by answer the discovery obtained by affidavit, and, therefore, the right to file interrogatories being taken away, it was not possible to supplement it at all.

It would seem, therefore, that the rule of June 1, 1854, ought to have been precisely the reverse of what it was, *i. e.*, that it ought to have provided that the method in use of obtaining the production of documents after the hearing should extend and be applicable to production before the hearing. The rule would then have accomplished two important objects, for it would have supplied the omission, in sects. 18 and 20, of authority to file interrogatories, and it would have put upon those sections their true interpretation as to the relative time of making the affidavit of documents.

C. C. Langdell.

¹ See 18 Jur. Part II., p. 199.

CONTRIBUTION BETWEEN PERSONS JOINTLY
CHARGED FOR NEGLIGENCE — MERRY-
WEATHER *v.* NIXAN.¹

AS the commerce and business of the world broaden and the relations of persons engaged in industrial enterprises become more complicated, the question whether the courts will allow contribution between persons jointly chargeable as for *quasi delicts* or mere unintentional negligence is of ever increasing significance and importance.

The text-writers have not recognized the importance of the question, and have usually contented themselves with vague generalities, sometimes contradictory and often inaccurate. Whatever difficulties exist are due in part to the loose method in which many of the text-writers have treated the question, and are not due to any conflict in the decided cases themselves. The effort of this paper will be to present briefly examples of all the classes of cases on the subject, together with an analysis of the facts upon which each decision proceeded, the hope being thus to aid in clearing up a vitally important question left by the text-writers in great uncertainty.

The propositions of law under which all the cases will fall are believed to be two, and the discussion of them follows.

I.

As between conscious, wilful, malicious, or intentional joint wrong-doers, or tort-feasors who are in pari delicto, neither the law nor equity will intervene to adjust the damage by enforcing contribution.

Merryweather *v.* Nixan is usually styled the leading case on which the proposition rests. ‡ While this is true, yet the point there decided was clearly foreshadowed one hundred and seventy-five years earlier in Battersey's case.² With the foreknowledge and grasp of the law so often evinced by the early English judges, the court foresaw with clearness where the line should be drawn between cases in which recovery over would or would not be allowed,

¹ 8 Term Rep. 186, by King's Bench, in 1799.

² Winch's Rep. 48, by Common Pleas, in 1623.

and in a few words made evident their appreciation of the dividing line. It seems that Battersey, charged with rebellion from the Cinque Ports, was arrested and brought to the inn of the plaintiff by the defendant, with the request to the plaintiff to keep him a day and night, the defendant at the same time promising to indemnify plaintiff. Although the report does not so state in terms, yet it is inferentially quite evident that Battersey was kept by the plaintiff under duress; in other words, he was under arrest and physical restraint at the inn of the plaintiff. Battersey had sued the plaintiff for false arrest, and recovered. In an action upon the assumpsit of defendant to save plaintiff harmless it was held that the plaintiff should recover indemnity against the defendant, and Hobert, Chief Justice, and Hutton and Winch, answering the contention for the defendant that Battersey had been arrested and detained by the inn-keeper without cause, and that the promise to indemnify the inn-keeper was therefore void, said that, —

“Be the imprisonment lawful or not lawful, he might not take notice of that: as if I request another man to enter into another man's ground, and in my name to drive out the beasts, and impound them, and promise to save him harmless, this is a good assumpsit, and yet the act is tortious.”

And by Hutton, J., it was further said that, —

“Where the act appears in itself to be unlawful, there it is otherwise, as if I request you to beat another, and promise to save you harmless, this assumpsit is not good, for the act appears in itself to be unlawful, but otherwise it is as in our case, when the act stands indifferent.”

The case of *Philips v. Biggs*¹ was, it is true, cited in the argument of *Merryweather v. Nixan*, but an examination of the report discloses that the point was not decided.

It is singularly unfortunate, and has led to misunderstanding, that *Merryweather v. Nixan* should have been continually treated as stating the “general rule.” As a matter of fact that case states not the rule, but the exception. The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution, and the exception is that no assumpsit, either express or implied, will be enforced among wilful tort-feasors or wrongdoers.

¹ *Hardres*, 164 (1659).

The general rule has been recently thus stated: —

"Where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them are compelled to pay the whole, or more than his or their share, those paying may recover from those not paying the aliquot proportion which they ought to pay."¹

Green, J., in the early Virginia case of *Thweatt v. Jones*,² has succinctly stated the reason and the limitations of the decision in *Merryweather v. Nixan* as follows: —

"The reason why the law refuses its aid to enforce contribution amongst wrongdoers is, that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences; a reason which does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties."

In considering the facts in *Merryweather v. Nixan*, and in applying that decision, it is important to bear in mind that the meaning of the word "tort" at the time of the decision in 1799 was limited and narrow. None of the early writers, such as Bacon, accurately defined torts, but the actions which they treat as torts are practically all actions such as batteries, slanders, etc., which were, of course, wilful or intentional wrongs. At that time the word "tort" had not come to be applied to the vast number of *quasi delicts* now known and classified as actions sounding in tort and arising out of mere negligence or unintentional injury. The classification of such actions as technical torts is of comparatively recent date. It is, therefore, vital to a correct understanding of the decision, that this limited meaning of the word "tort" — *i. e.*, a wilful or intentional wrong — be remembered. The vagueness of the term "tort," even at the present time, was commented upon by Lord Halsbury in a recent important authority on contribution, — *Palmer v. Wick & Pulteneytown Steam Shipping Company*.³ Lord Halsbury there said: —

"The difficulty which has arisen is, I think, one of words. The word 'tort' in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But 'tort' in its strictest meaning, as it seems to me

¹ 7 Am. & Eng. Enc. of Law (2d ed.), 326, title "Contribution and Exoneration."

² 1 Randolph, 328 (Va., 1823).

³ L. R. (1894) H. L. (Sc.) A. C. 318.

ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or *quasi delicts* and *delicts* proper is reasonable and just, though I doubt whether in dealing with an English case one would be at liberty to adopt such a distinction."

With the true meaning of "tort" in mind we turn then to the facts in *Merryweather v. Nixan*, where a judgment had been recovered against the plaintiff and defendant jointly in an action for injury to a reversionary interest in a mill and for trover for machinery. The whole damages were levied against the plaintiff, who thereupon sued his co-wrongdoer for contribution. The judgment of the court, pronounced by Lord Kenyon, was that there could be no contribution.

Although the decision has been sometimes condemned, yet the exception announced by the case had its rise in an enlightened view of the best public policy. The report of the facts in the case is somewhat meagre, but it is clear that the action proceeded on the theory of a malicious and wanton tort and trover. The fact that trover, with plea of not guilty, was the remedy chosen is of itself sufficiently significant and indicates a wilful joint wrong. Upon this theory of the case—and clearly no other theory will explain the subsequent decisions of the English courts commenting upon, following, or distinguishing *Merryweather v. Nixan*—the ethical objections to the decision entirely disappear. To one of two wrongdoers who had maliciously and without color of right injured the reversionary interest in, and had taken the machinery from, the mill, the court said in effect, "As a punishment for the wilful and malicious joint wrong which you have committed, and to intimidate you from again offending, the aid of the machinery of the courts of justice will be denied you when you seek to compel your co-wrongdoer to assume any part of the burden." Unquestionably it would be highly mischievous for the courts to step in and adjust among intentional wrongdoers the damage flowing from the wrong. By entertaining such suits the courts would aid intentional wrongdoers in avoiding the consequences of their acts. But limited to the case of intentional wrongdoers, the wisdom and rough and stern justice of the decision are apparent.

Defined within the limits laid down by subsequent English decisions, and intended, we think, by Lord Kenyon, the decision, so far from being objectionable even from an ethical point of view, is a

sound, salutary, and indeed necessary rule of law. Properly understood, it is confined to those cases wherein the joint wrong was confessedly intentional or immoral, or — as a crime or misdemeanor or those borderland offences, like slander — was of such a nature as to raise the presumption of wilfulness and malice.

The principal American cases wherein the rule of *Merryweather v. Nixan* has been applied are the following: —

In *Peck v. Ellis*,¹ contribution was denied in equity to one of two joint wrongdoers who had fraudulently and without right cut and carried off timber and logs.

In *Arnold v. Clifford*,² Judge Story held that neither contribution nor indemnity under an express contract would be enforced by the courts for the consequences of the joint publication of a libel.

In *Miller v. Fenton*,³ contribution was denied among officers of a bank who had jointly and fraudulently abstracted the funds.

In *Hunt v. Lane*,⁴ contribution between joint tort-feasors or wrongdoers was denied, and the rule of *Merryweather v. Nixan* applied, because the complaint seeking contribution did not show what the nature of the tort was, and the court, therefore, assumed that it was of such a class as would fall within the rule.

In *Rhea v. White*,⁵ complainant sought and was properly denied contribution for the amount of a judgment which he had paid. The judgment was in an action of trover for the joint conversion of certain slaves, and the complainant did not allege in his bill, or prove, that the conversion was made under mistake or in ignorance of the want of title.

In *Anderson v. Saylor*,⁶ contribution was denied, the judgment for which it was sought being in trover, but the nature of the act not appearing from the report of the case.

In *Andrews v. Murray*,⁷ the opinion of the court stated that one trustee could not have contribution against another for their joint negligence which had resulted in loss; but the decision was rested upon the fact, found by the court to exist in the case, that the claim paid by plaintiff was not one for which all the trustees were liable. The remark of the court was, therefore, *obiter*.

In *Spalding v. Oakes*,⁸ the parties had kept upon defendant's farm for their joint use a ram known to both of them to be vicious.

¹ 2 Johns. Ch. 131 (N. Y., 1816).

² 11 Paige, 18 (N. Y., 1844).

³ 3 Head, 121 (Tenn., 1859).

⁴ 33 Barb. 354 (N. Y., 1861).

⁵ 2 Sumner (U. S.), 238 (1835).

⁶ 9 Ind. 248 (1857).

⁷ 3 Head, 551 (Tenn., 1859).

⁸ 42 Vt. 343 (1869).

The ram was not restrained, as he should have been, and this fact was known to both parties. The ram escaped and did an injury to a woman, for which recovery was had and paid by plaintiff and defendant, the larger share having been borne by plaintiff. In this attitude of the case plaintiff sued defendant for indemnity or contribution; but this was denied, on the ground evidently that the failure to restrain an animal known to be vicious was a wilful and intentional wrong.

In *Atkins v. Johnson*,¹ a journalist (the plaintiff) had published a libellous article upon the faith of a contract with the writer (defendant) to indemnify him. There was a recovery against the journalist for the libel, whereupon he sought to recover over indemnity upon his contract or contribution, but the court denied the right to either; Pierpont, C. J., saying: —

“In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known.”

In *Wehle v. Haviland*,² contribution was denied as between persons who had made a wrongful joint levy of an attachment against certain goods. This case is in conflict with the weight of respectable authority, and is unsound. But it proceeds on the theory that the levy was an intentional wrong, and even if sound, the case upon its facts is not authority for the denial of contribution among persons jointly liable for mere unintentional negligence.

In *Boyd v. Gill*,³ Wallace, J., said that there could be no contribution between trustees who had fraudulently misappropriated the trust funds.

In *Davis v. Gilhaus*,⁴ plaintiff and defendant had been in business as partners. Defendant was also county treasurer. He used the county funds in the business with the knowledge of plaintiff. Upon dissolution plaintiff was compelled to reimburse the county in full, whereupon he sought contribution, which was denied, on the ground that the facts constituted a joint embezzlement of the public money; and Johnson, J., said, “That each of these partners were equally guilty in the eye of the law for embezzling the public money is clear.”

¹ 43 Vt. 78 (1870).

² 19 Fed. 145 (1883).

³ 42 How. Pr. 399 (N. Y. 1872).

⁴ 44 Ohio St. 69 (1886).

In *Boyer v. Bolender*,¹ one of several directors of an insurance company paid off a judgment recovered against the directors jointly for the fraudulent appropriation of the company's money to their own use. Contribution was denied him against his co-directors.

It will be seen that in every American case where the rule of *Merryweather v. Nixan* has been applied the facts show either an intentional tort or an act, as the basis of joint liability, which is *malum in se* or immoral. No case has been found applying the rule to a joint tort or *quasi delict* not intentional and not immoral.

II.

Even though parties are in pari delicto, contribution will be allowed for joint quasi delicts where the wrong or tort was not wilful, malicious, intentional, unlawful, or immoral.

As the scope of this paper is limited to the discussion of the rules governing contribution, those cases wherein indemnity has been recovered or denied will not be discussed; but as they involve collateral and equally important questions, reference to some of the more instructive of them will be found in the foot-note.²

As an instance of the confusion of mind which the text-writers have shown in dealing with this branch of the subjects of contribution, we may refer to Webb's *Pollock on Torts*, page 233, wherein no less an authority than Sir Frederick Pollock stated the rule to be that "a wilful or negligent wrongdoer has no claim to contribution or indemnity;" but after the word "negligent" he added an original note, "I am not sure that authority covers this," and thus left the subject speculative, as he cited no case in support of his proposition, so far as that proposition related to mere negligence.

In Clerk & Lindsell's *Torts*³ an admirable discussion will be

¹ 129 Pa. 324 (1889).

² *Adamson v. Jarvis*, 4 Bing. 66 (1827); *Betts v. Gibbins*, 2 Ad. & El. 57 (1834); *Lowell v. Boston & Lowell R. R. Co.*, 40 Pick. 24 (Mass., 1839); *Gower v. Emery*, 18 Me. 79 (1841); *Jacobs v. Pollard*, 10 Cush. 287 (Mass., 1852); *Moore v. Appleton*, 26 Ala. 633 (1855); *Chicago v. Robbins*, 2 Black, 418 (1862); *Chicago v. Robbins*, 4 Wall. 657 (1866); *Gray v. Boston Gaslight Co.*, 114 Mass. 149 (1873); *Churchill v. Holt*, 127 Mass. 165 (1879), and the same case again reported in 131 Mass. 67 (1881); *Old Colony R. R. Co. v. Slavens* (Mass., 1889), 38 Am. & Eng. R. Cas. 382; *Rochester v. Campbell*, 123 N. Y. 405 (1890); *Gulf, C. & S. F. Ry. Co. v. Galveston, H. & S. A. Ry. Co.*, 83 Tex. 509 (1892); *O. S. Nav. Co. v. Compania T. Espaniola*, 134 N. Y. 461 (1892); *Cincinnati, etc. R. Co. v. L. & N. R. Co.*, 97 Ky. 128 (1795); *The Englishman and The Australia* (1894), P. 239 (1895), P. 212; *District of Columbia v. Washington Gaslight Co.*, 161 U. S. 316 (1896); and *Wilhelm v. Defiance*, 50 N. E. Rep. 18 (Ohio, 1898).

³ 2d ed., 1896, note b, p. 66.

found of the limitations of *Merryweather v. Nixan*, and it is there said:—

“It is sometimes loosely said that there is no contribution between joint tort-feasors, that is to say, that if, on an action being brought for a joint tort, one wrongdoer pays the whole damages recovered, he cannot, whatever the nature of the tort, recover a proportion of the damages from the others. For this wide proposition there is apparently no authority except the head-note to the report of *Merryweather v. Nixan* in the Term Reports (8 T. R. 186), which head-note does not seem to be borne out by the judgment.”

Perhaps of all the earlier text-books Broom's *Legal Maxims*¹ shows the broadest and soundest conception of *Merryweather v. Nixan*. In that work the rule is stated as follows:—

“To the above maxim respecting *par delictum* may also be referred the general rule that an action for contribution cannot be maintained by one of several joint wrongdoers against another, although the one who claims contribution may have been compelled to pay the entire damages recovered as compensation for the tortious act. It is, however, expressly laid down that this rule does not extend to cases of indemnity, where one man employs another to do acts not unlawful in themselves for the purpose of asserting a right; and it is also clear, from reason, justice, and sound policy, that this doctrine applies only where the person seeking redress must be presumed to have known that he was doing an unlawful act.”

In *Lingard v. Bromley*,² the Master of the Rolls held that contribution would be enforced among assignees in bankruptcy to reimburse a payment by one under an order for a loss occasioned by their joint act. It was said that the loss had been occasioned by “the non-performance of a civil obligation,” thus indicating the distinction afterward drawn in the English cases between merely civil neglect, or negligence, and the intentional class of tort for which contribution will not be allowed.

In *Thweatt v. Jones*,³ the complainant filed a bill in chancery asking contribution. Complainant was the administrator of an inspector of tobacco, while the defendant was the administrator of another inspector of tobacco. There had been previously a judgment against the complainant for failure of his intestate to deliver tobacco when legally demanded, which judgment complainant's in-

¹ Pages 328, 329.

² 1 Ves. & B. 114 (1812).

³ 1 Randolph, 328 (Va., 1823).

testate had discharged. It appeared that Thweatt and Hinton, who were co-inspectors of tobacco, had by a mere mistake or negligence delivered the receipts therefor, and the tobacco itself, to some person other than the owner. Held, that the rule denying contribution among joint tort-feasors does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties.

Merryweather *v.* Nixan was cited and relied upon to defeat contribution, but Green, J., denied its application to the facts before the court, and said : —

“Contribution is not due by reason of any contract, express or implied. But when any burthen ought, from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is *in aequali jure*, contribution is due, unless the claim to contribution has arisen out of some *actual fraud*, or *voluntary wrong*, in which the party claiming contribution has participated. The mere non-performance or violation of a civil obligation is not such a wrong as will condemn a claim to contribution. The act which precludes a party from the right to claim contribution from those who were equally liable to the burthen as himself, must be *malum in se*, as actual fraud or voluntary wrong.”

And again he said : —

“Courts of law enforce contribution only in cases where a contract between the parties to that effect may be presumed ; but courts of equity indulge in a larger jurisdiction, and admit contribution whenever the parties were originally subject, jointly, to the burthen, and are *in aequali jure*, and where the party claiming the assistance of the court is not precluded, by his own turpitude, from receiving it. In the case at bar, the only default of the inspectors appears to have been the non-delivery of the tobacco to the owners of it. This might happen in various ways, without imputing fraud or voluntary wrong to the inspectors. It might have been delivered, as is stated in the evidence given in one of the suits at law (which is, however, no evidence against the defendants in this suit), in consequence of the notes or receipts having been delivered to a person producing a forged order. It might have been delivered to an improper person by mere mistake, or stolen ; and, in the absence of all proof, although it might have been embezzled by the inspectors, such embezzlement ought not to be presumed. Fraud is odious, and ought to be proved. Nor do I think that this conclusion ought to be affected by the statement in the bill that the judgments were recovered for a joint *malversation* in office. That is a loose expression, corrected by the context of the bill, and by the records of those judgments, which exhibit

nothing inconsistent with the supposition that the tobacco was lost to the owners by a fraud practiced upon the inspectors or by their mistake."

"The case seems to me to resolve itself into these propositions. When parties are equally bound to bear a burthen, and are *in aequali jure*, that is, liable from the same circumstances existing as to both, contribution is due of right, in equity; that this general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution, forfeits such right if the joint liability arose from an act *malum in se*, a fraud or voluntary tort, in which he participated; that when it is shown that the parties were originally equally bound, and stood *in aequali jure*, the party who has paid all, is entitled of course to contribution, unless it be shown on the other side that his right has been forfeited as aforesaid, by his own wrongful act. No such fact is alleged or proved in this case."¹

In *Wooley v. Batte*,² one of two partners owning a stage-coach sustained a recovery by a passenger who was injured by the negligence of the coachman. Upon suit against his partner for contribution the court held him entitled to recover, and refused to apply *Merryweather v. Nixan*.

In *Pearson v. Skelton*,³ the parties were jointly interested in a stage-coach. By the negligence of the driver a person was injured, and a recovery had against the plaintiff, who thereupon sued the defendant for contribution. One defence attempted to be interposed was that contribution could not be had because the liability grew out of a tort, but the court held that this ground was not tenable.

In *Horbach v. Elder*,⁴ several persons were engaged as co-partners in operating a stage line. By the negligence of a driver a passenger was injured, and he sued and recovered from one of the co-partners, who thereupon sued the others, and was held entitled to recover contribution from them.

¹ Five judges were upon the bench at the time this case was decided, and four delivered opinions, two being in favor of and two against contribution. The reporter states that Fleming, P., the fifth judge, was absent during the period of the cases in *1 Randolph*, and as the lower court had refused contribution the result would seem to have been a denial of the right by divided court, but the reporter also states in his syllabus that contribution was allowed. Possibly the explanation of this apparent anomaly is that Fleming, P., did actually join in the decision of this particular case, and held with Green, J., that contribution should be allowed. Or, as is more likely, at least three of the judges agreed upon the syllabus, although Judge Brooke thought the case one of "malversation" or wilful wrong, and, therefore, not a case for contribution.

² 2 C. & P. 417 (1826).

³ 1 M. & W. 504 (1836).

⁴ 18 Pa. 33 (1851).

In *Acheson v. Miller*,¹ contribution was sought for a wrongful joint levy upon certain goods. The parties who directed the levy believed it to be lawful. The court held that they were wrongdoers, and applied *Merryweather v. Nixan*, denying contribution.

Thus the case was reversed and sent back for re-trial.

But when it came before the Supreme Court of Ohio a second time (2 Ohio State, 203, 1853) the unsoundness of the former decision was recognized, the decision in terms overruled and contribution allowed, Caldwell, J., saying:—

“The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them. In such case, if one of the parties who have done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion? The common understanding and justice of humanity would say that it would be just and right that each of the parties to the transaction should pay his proportion of the damage done by their joint act; and we see no reason why the moral sense of a court shall be shocked by such a result.”

In *Bailey v. Bussing*,² the owner of a coach, after being charged for the negligence of the driver, sued him for contribution, and it was held he could recover.

Ellsworth, J., said:—

“The reason assigned in the books for denying contribution among trespassers is that no right of action can be based on a violation of law; that is, where the act is known to be such, or is apparently of that character. A guilty trespasser, it is said, cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or, as the case may be, a contribution,—as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right; an assistant rendering aid to a sheriff in the execution of process; or com-

¹ 18 Ohio, 1 (1849).

² 28 Conn. 455 (1859).

mon carriers, to whom is committed, and who innocently carry away, property which has been stolen from the owner. . . . The form of action, then, is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like."

In *Selz v. Unna*,¹ parties to a joint wrongful levy upon the goods of Unna had contributed to the payment of a judgment against them, and then sought, under a fraudulent agreement made in the course of one branch of the litigation, to place the whole loss upon Unna, instead of his proportion, which he had already paid. The court declined to disturb the contribution made by the parties themselves, and Mr. Justice Clifford said: —

"Equal contribution to discharge a joint liability is not inequitable, even as between wrongdoers, although the law will not, in general, support an action to enforce it where the payments have been unequal. (*Merryweather v. Nixan*, 8 T. R. 186; *Bailey v. Bussing*, 28 Conn. 455.) Where the liability is joint, equal contribution is just, and it would afford the complainants no ground of relief if it appeared that the arrangement with the marshal was such as is alleged in the bill of complaint. Having collected three-fourths of the amount of the other defendants, it was quite right that he should, if possible, levy the balance so as to effect equal justice between the parties."

In *Armstrong County v. Clarion County*,² a traveller while passing over a bridge between the two counties, plaintiff and defendant, was injured by the breaking down of the bridge due to negligence in its maintenance. The duty of maintaining the bridge rested upon both counties. The traveller sued and recovered (including costs, \$1,597.31) from Armstrong County alone for negligence. Armstrong County paid the judgment, and then brought assumpsit against Clarion County for contribution of its proportion, or one-half the judgment, costs, etc.

Read, J., said (pages 219, 220): —

"There can be little doubt that morally Clarion County was bound to pay one-half of the sum recovered from and paid by Armstrong County ;

¹ 6 Wall. 327 (1867).

² 66 Pa. 218 (1870).

and the question is, does not the law make the moral obligation a legal one?"

After commenting upon *Merryweather v. Nixan*, and other cases, Judge Read answered his query as follows (pages 221, 222): —

"The parties, plaintiff and defendant, are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other."

In *Power v. Hoey*,¹ directors of a railway company had irregularly and improperly accepted promissory notes of one of their number in payment for his shares, and had reported the shares to the company as full paid. Held, that the transaction was not so fraudulent or illegal as to entitle the representative of the debtor to repudiate the debt, and the directors having voluntarily made good to the company the full price of the shares, were held entitled to be indemnified out of the assets of the debtor.

In *Nickerson v. Wheeler*,² the property of the president of a manufacturing corporation was taken in satisfaction of a decree against him and the other officers, holding them personally liable to a creditor for neglect to file the annual certificates required by law. Held, that the president might have contribution from the other officers, and Devens, J., said: —

"It is contended that, as the liability of the plaintiff and defendants to the creditors of the corporation, of which they were officers, arose from their neglect of duty as such officers to file the annual certificate required by the St. of 1862, c. 210, the principle upon which at common law it has been decided that one wrongdoer who has paid the damages recovered on account of the wrongful act of both is not entitled to contribution from the other, applies here, and therefore that the plaintiff cannot maintain this suit. *Merryweather v. Nixan*, 8 T. R. 186. But although one may have been made liable in tort, he is not necessarily deprived of contribution from another also originally liable, where the foundation of the action is simply negligence on the part of each in carrying on some lawful transaction. Thus, where one of two coach proprietors had been made liable in tort to a party who was injured by the negligence of a servant employed by himself and another, he was entitled to contribution

¹ 19 W. R. 916 (1871).

² 118 Mass. 295 (1875).

from his co-proprietor. *Wooley v. Batte*, 2 C. & P. 417. Both were engaged together in lawful business, and the negligence of which they were guilty, in employing a servant from whose misconduct injury resulted, did not place them in such position that they were treated as wrongdoers, whose action against each other could only be founded in their community of wrong. The cases of *Oakes v. Spaulding*, 40 Vt. 347, and *Spaulding v. Oakes*, 42 Vt. 343, relied on by the defendants, do not conflict with this. The parties to the transaction there were engaged in what was a wrongful act as against any one injured thereby, namely, keeping a vicious animal, and the neglect to take care of it, by reason of which it did injury, was not an act of nonfeasance merely; the whole act of keeping it was one of misfeasance."

In *Ashhurst v. Mason*,¹ shares of a company were purchased and transferred (*ultra vires*) to the name of a director in trust for the company. He then paid calls upon the shares, and the Vice-Chancellor (Sir James Bacon) held him entitled to contribution from the other directors who concurred in the transaction.

In *Herr v. Barber*,² Mr. Justice Hagner said (p. 556): —

"The principle that there can be no contribution, at law, enforced by one tort-feasor against the other wrongdoers, is limited by the more modern authorities to cases where the transaction, out of which the judgment arises, involves moral turpitude."

Although he properly declined in the case before him to allow contribution, because upon the facts there was a breach of trust having the elements of a deliberate, intentional wrong.

In *Ankeny v. Moffett*,³ it was held (irrespective of a statute there involved) that the rule that there can be no contribution among wrongdoers applies only where the person seeking the contribution must be presumed to have known that he was doing an illegal act. Accordingly, in that case, the court allowed contribution between two persons through whose negligence, or through that of their agents, a building in course of construction upon their property fell and injured a man.

In *Smith v. Ayrault*,⁴ there had been a recovery against Smith for infringement of a patent upon steam-pipe casing. Smith and Ayrault were partners, and the infringement had been committed

¹ L. R. 20 Eq. 225 (1875).

² 2 Mackey, 545 (Supreme Court, District of Columbia, 1883).

³ 37 Minn. 109 (1887); s. c. 33 N. W. 320.

⁴ 71 Mich. 475 (1888).

by and in the name of the firm, although Smith was alone sued and paid the entire judgment. Upon an assumpsit by Smith against Ayrault for contribution, the plaintiff recovered.

In *Van Diver v. Pollak*,¹ contribution was allowed between joint trespassers where their trespass consisted of levies made by their joint procurement under their several attachments, and was made in good faith, believing that the claim of the assignee to the property was actually fraudulent.

To the same general effect see *Farwell v. Becker*.²

In *Gulf, Colorado, & Santa Fé Ry. Co. v. Galveston, Harrisburg, & San Antonio Ry. Co.*,³ the three companies had a yard used indiscriminately by all three, but belonging exclusively to the Gulf Company. A joint employee of the three companies in the yard was injured while coupling cars on an unballasted track, and sued jointly the Gulf Company and the Galveston Company, recovering a judgment which was paid half by the Gulf Company and half by the Galveston Company. The injury was found by the court to have been caused by the negligence of the Gulf Company and the Galveston Company. The court further found that the New York Company had not been guilty of any negligence.

Upon these facts the Gulf Company sued the Galveston Company for indemnity, and the New York Company for contribution, and the court held:—

First, That as the Gulf Company had furnished an unballasted and unsafe track, it was guilty of the primary negligence, and cannot have indemnity against the Galveston Company.

Second, That as the New York Company was found free from fault, it cannot be compelled to contribute.

And Hobby, P. J., laid down the correct general rule as to contribution as follows:—

“The rule is far from being universally true that there can be no contribution between wrongdoers. It prevails in that class of cases denominated as intentional torts or wrongs.”

In *Palmer v. Wick & Pulteneytown Steam Shipping Company*,⁴ the appellant, a stevedore, was engaged in discharging iron from the respondent's ship, when one of his workmen was killed by the fall of a block, part of the ship's tackle. The tackle was de-

¹ 97 Ala. 467; s. c. 19 L. R. A. 628 (1893).

² 21 N. E. 792 (Ill., 1889).

³ 83 Tex. 509 (1892).

⁴ L. R. (1894), H. L. (Sc.) A. C. 318.

fective and was negligently used by the stevedore. The family of the workman sued the company and the stevedore jointly, and recovered a judgment which was paid in full by the company. The case as it came to the House of Lords was an action by the company against the stevedore to recover the moiety or one-half of the judgment. Held, affirming the Inner House, that the stevedore was liable.

Lord Herschell, L. C., said : —

“ It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of *quasi-delict* a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion which I gather my noble and learned friend Lord Watson holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal, I cannot but think that equity and justice are in favor of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents ; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

“ Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather v. Nixan*, 8 T. R. 186. The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country ; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson v. Jarvis*, 4 Bing. 66, Best, C. J., in delivering the judgment of the court, referred to the case of *Phillips v. Biggs*, Hard. 164, which he said was never decided ; ‘ but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.’ He then proceeded as follows : ‘ From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixan*, 8 T. R. 186, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking

redress must be presumed to have known that he was doing an unlawful act.' If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tort-feasor cannot recover from another is inapplicable to a case like that now under consideration."

Lord Watson said: —

"From these authorities, which are to some extent conflicting, and in other respects are not so definite as one could wish, I think the following conclusions may be derived. They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the *dicta* of those writers who negative the existence of such a right can be held to contemplate every case of *quasi-delict*, whatever be its nature. They *primâ facie* refer to proper delicts, and might *ex paritate rationis* be extended to every *quasi-delict* which, according to the phraseology of Scotch law, *sapit naturum delicti*, but they cannot, in my opinion, be fairly read as referring to *quasi-delicts* which involve no moral offence on the part of the delinquent."

The rule on this point must inevitably be laid down by the courts, as announced in the Scotch case of *Palmer v. Wick & Pulteneytown Steam Shipping Company*, and the Pennsylvania case of *Armstrong County v. Clarion County*, and the other cases *supra*. Not only do good morals require this rule, but it is vitally necessary to the conduct of business under modern conditions. And, furthermore, the reason for the decision in *Merryweather v. Nixan* does not exist in the case of a merely negligent tort, not in itself unlawful or intentional.

To illustrate the unwisdom of any rule but the one contended for, we may instance the bond given to a sheriff before he makes a levy. If the levy turns out to be wrongful, the sheriff is properly held a wrongdoer as to the person aggrieved, but if to his act and to the bond indemnifying him *Merryweather v. Nixan* were to be applied, and if under that case his act were to be treated as intentional wrong, then the bond would be quite as ineffective to protect him as the implied assumpsit for indemnity.

The courts, however, invariably uphold the right of a sheriff to require such bonds,¹ and thus show that *Merryweather v. Nixan*

¹ *Bond v. Ward*, 7 Mass. 123 (1810); *Spangler v. Commonwealth*, 16 S. & R. 68 (1827); *Chamberlain v. Beller*, 18 N. Y. 115 (1858); *Smith v. Cicotte*, 11 Mich. 383 (1863); *Commonwealth v. Vandyke*, 57 Pa. 34 (1868); *Long v. Neville*, 36 Cal. 455 (1868); *Grace v. Mitchell*, 31 Wis. 533 (1872).

does not apply. In fact, Lord Kenyon in *Merryweather v. Nixan* clearly intimated that such a bond would be upheld.

But if the purpose of such a promise of indemnity were treated as illegal,—if the tort in such a case were held an intentional wrong,—the courts will not enforce the contract.¹

All such contracts of indemnity against the possible consequences of negligent torts will be void and not enforceable in the courts if *Merryweather v. Nixan* were improperly extended to any wrong except intentional or malicious wrong, or crime or misdemeanor.

Any other rule than that stated in proposition II. would result in the railroad companies, factory owners, owners of buildings having elevators, and other persons who have insured against loss by negligence of their employees, finding the doors of the courts closed to them when they bring assumpsit upon their policies to recover over the amounts of judgments against them for torts.²

Proposition II. rests upon both reason and authority, and no single case, it is believed, has been decided against it when the facts are analyzed. To lay down any rule other than that em-

¹ *Colburn v. Patmore*, 1 C. M. & R. 73; s. c. 4 Tyrw. 677 (1834); *Arnold v. Clifford*, 2 Sunn. (U. S.) 238 (1835); *Shackell v. Rosier*, 2 Bing. N. Cas. 634; s. c. 29 E. C. L. 438 (1836); *Atkins v. Johnson*, 43 Vt. 78 (1870).

² The recent decision in the Admiralty Division of the High Court of Justice in *The Englishman and the Australia* (1895, P. 212) is a case of interest in considering the validity of contracts insuring against the consequences of negligence. The case has been considered unsound by the writers of the most extensive treatise recently published in England on Torts, — Clerk & Lindsell, *Torts* (2d ed. 1896), 56, note *b*, — wherein the case is stated not to be distinguishable from the decision of the Lords in *Palmer v. Wick & Pulteneytown Steam Shipping Company*, L. R. (1894), H. L. (Sc.) A. C. 318.

Bruce, J. (1895, P. 217), said in *The Englishman and the Australia*: "It was never decided in *Merryweather v. Nixan* that one wrongdoer could not sue another for contribution, but that an implied promise to indemnify did not arise from the mere fact of payment of the whole of the joint liability by one of several wrongdoers."

The decision does not deny the validity of an express contract either for contribution or indemnity in a case of joint negligence, but places the judgment on the ground that in the admiralty and upon the particular facts appearing in that case the law would not imply a contract for indemnity or contribution. It is difficult to understand how the court reached the conclusion that an express contract would be upheld while the law would not imply one, but in any event the case, if deemed in conflict with *Palmer v. Wick*, where the right to contribution for joint negligence was distinctly recognized by the House of Lords, cannot be regarded as an authority against contribution in such a case. The principal importance of the decision of Bruce, J., lies, it is believed, in the distinct statement contained in his opinion to the effect that express contracts — such as the insurance contracts mentioned in the body of this paper — will be upheld by the courts.

bodied in II. would be against good conscience, and would be a blind, hidebound application of the principle of *Merryweather v. Nixan* to a state of facts in which the reason for that decision has no existence.

Not only are both of the propositions believed to be sustained by the decided cases, but when the subject is broadly considered and thoroughly understood, the courts, influenced alike by the authorities and by the ethical principles involved, surely must announce the law as stated.

Theodore W. Reath.

PHILADELPHIA, August 12, 1898.

THE LAW AND ITS LIMITATIONS.

IT is generally agreed that the functions of government are three: legislative, judicial, and executive.¹ And it is often assumed that it is the part of the executive to execute the law. As a matter of fact, however, the great bulk of the law in the United States, so far as its forcible execution is concerned, is executed by sheriffs and their deputies, or other similar officers, who take their orders directly from the courts and are responsible to them.² And the courts, in the exercise of their judicial function, issue these orders with reference to each particular case without consulting the executive department of the government. It is true that many writs read like orders from the chief executive to an inferior officer,³ but this is merely a fiction due to the assumption aforesaid. *De facto*, the orders come from the courts; that is, from the judicial, not the executive department. As Mr. Justice Holmes has put it, "the *command* of the public force is intrusted to the judges in certain cases."⁴ The law, therefore, may be described as substantially those rules which are used by the courts in determining when and to what extent the public force shall be used against individuals in time of peace,⁵ — the government being sued by its own citizens by its own consent and not as a matter of law.⁶

¹ In the convention which framed the Constitution of the United States the first resolution was that "a national government ought to be established, consisting of a supreme legislative, judiciary, and executive." Journal of the Federal Convention, 82, 83, May 30, 1787.

² It seems to be the other way in France, where the persons who actually execute the law really belong to the executive department, and for mistakes in execution are responsible, not to the courts, but to their executive superiors, under a *droit administratif* which has no counterpart in the United States.

³ The writs in the Federal courts, for instance, read like an order from the President of the United States.

⁴ Mr. Justice Holmes, *The Path of the Law*, HARVARD LAW REVIEW, x, 457.

⁵ "The thing to remember is that *coercion by the State* is the essential quality of the law, distinguishing it from morality or ethics." John F. Dillon, LL.D., *The Laws and Jurisprudence of England and America*, 12.

⁶ "It is a fundamental principle of our jurisprudence that the Commonwealth cannot be impleaded in its own courts except by its own consent clearly manifested by act of the legislature." Op. of Mr. Chief Justice Gray, in *T. & G. R. R. Co. v. Commonwealth*, 127 Mass. 43.

From the point of view of an individual, a collision with the public force is obviously a serious matter. Consequently, most individuals try to avoid one and govern their conduct accordingly; and thereupon the rules which determine the use of the sheriff have at once the effect of rules of conduct for individuals.¹ There are, of course, exceptional cases. The Fugitive Slave Law² could hardly have been described as a rule of conduct in Massachusetts, because most Massachusetts people preferred to risk a visit from the sheriff rather than return fugitive slaves. Other deplorable instances will occur to the reader. It is sufficient here to observe that they are rare. Most people make most of their conduct conform to most of the law. It is accordingly substantially, although not perfectly, correct to describe the law as a body of rules of conduct for individuals, just as we describe a diamond as a precious stone; that is, not by describing the thing itself, but rather by describing its effect on us, and our consequent attitude towards it.

There is, however, in this description, besides the slight margin of inaccuracy already stated, a further difficulty, or more correctly speaking, a need of further explanation. Such a description tends to imply that the law, in so far as it is a set of rules of conduct, is a single set of rules; and this is not true. The orders for the use of the public force are given by the judges. Consequently, the rules by which a judge decides whether he will or will not order the sheriff to act in any given case are for him, in the exercise of his judicial function, rules of conduct, pure and simple. They are the rules by which he decides what he will do. Consequently, the law is not a single set, but a double set, of rules of conduct. It is primarily a set of rules of conduct for judges in the exercise of their judicial function. It is, secondarily, in its effect, a set of

¹ Most definitions of the law assume that the law is primarily a rule of conduct. Blackstone, for instance, following Hobbs, defines municipal law as "a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong." 1 Bl. Comm. 44. But so far as the writer knows, no such definition of the law has been generally accepted as satisfactory. See remarks of Judge Dillon in "Laws and Jurisprudence of England and America," page 9. Furthermore, Blackstone himself says that "all jurisdiction implies superiority of power. . . . And if the prince gives the subject leave to enter an action against him . . . in his own courts, the action itself proceeds rather upon natural equity than upon municipal laws. For the end of such action is not to compel the prince . . . but to persuade him." 1 Bl. Comm. 242, 243. See also the remarks of Mr. Justice Holmes, HARVARD LAW REVIEW, x, 462: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else."

² Acts of the 31st Cong. 1st Sess. Chap. LX., approved Sept. 18, 1850.

rules of conduct for individuals. In either aspect, as rules of conduct it must look for its ultimate justification to all those considerations based on morality by which conduct is regularly tested. Only in any particular case the conduct of the judge may be subject to one set of considerations, and the conduct of the parties to an entirely different set. For instance, how far a judge ought to interfere in trouble between members of the same family is one question. How a man ought to treat his wife is another question. Consequently, between conduct becoming a gentleman, on the one hand, and, on the other, conduct so gross that a divorce court will interfere, is a middle ground, including various degrees of brutality that may be technically within a man's "rights." But it does not follow from this that it is right for him to behave like a blackguard. Conclusions drawn with reference to the conduct of the judge are not to be transferred either consciously or unconsciously to premises referring to the conduct of the parties. It is only by keeping these two positions separate, drawing separate conclusions from each point of view, comparing these conclusions, and confining the law to the extent to which they overlap,—it is only in this way that the law, so far as it goes, can be kept in accord with morals, justifying its nomenclature borrowed from morals, and at the same time the liberty of the citizens, including the freedom, in many cases, to make mistakes and suffer their natural consequences, can be preserved. All those conclusions drawn from one point of view, and not covered by conclusions drawn from the other point of view also, are not properly within the law. For instance, from the point of view of the individual a man should not covet his neighbor's goods. But from the point of view of the judge a court ought not to give orders in matters of which it cannot be reasonably certain. And it cannot be reasonably certain of what goes on in other men's minds, there being no such thing as general telepathy. Consequently, the passion of covetousness is not properly within the law, and the law is confined to what theologians call external morality.¹ This is undoubtedly a limitation from one point of view. But because we naturally refer limitations to the subject-matter of our inquiry rather than to the point of view from which we regard it, especially if that point of view is a more or less unconscious one, we often speak of such instances as limitations of

¹ Sir Frederick Pollock, *Justice according to Law*, HARVARD LAW REVIEW, ix, 303.

the law. Whereas, what we should do in such a case is to speak of the law as limited individual morals. All those rules, such as the Statute of Limitations, the Statute of Frauds, and the Insolvency Acts, rules that owe their existence and look for their justification not to what individuals ought to do, but to what judges ought not to make them do, are instances of this kind of limitation.

Let us now turn, by way of comparison, to a limitation of the law in the strict sense of the phrase, — a limitation of the law itself. The law is generally studied as a science. But the practical expression of it is by the judges in the actual decision of cases,¹ and this is not a science at all, but an art. It is, indeed, always an art to give practical expression to anything, and it is just as truly an art to decide cases by a rational ascertainment of rules and their rational application, as it is to decide any other sort of question, medical, military, or æsthetic. Furthermore, every art has its own peculiarities and their consequent limitations, and the art of deciding cases at common law is no exception.

A decision at common law differs from a decision in any other profession in its quality as a precedent. A surgeon, for example, in deciding between an aneurism and an abscess, knows that his decision will be justified alone by the result. If he is right, the reasons for his decisions are of secondary importance. If he is wrong, if he opens an aneurism, mistaking it for an abscess, and the patient dies on the table, his reasons are at best an excuse. But it is not so in the law. A judge generally feels bound to follow some previous decision, and shrinks from carrying his own any further than he can teach it. The judgment in *Dumpro's Case*,² for example, may have worked admirable justice between the parties. It may have been very unfair in the lessors in that case to insist on the clause in their lease against assigning, after having sanctioned an "absolute" assignment "*quibus cumque*" which the parties may have understood to mean "anyhow" as well as "to anybody." But that is not the reason given by the court for its judgment. And when no one understands the reasons that are given, when Lord Eldon says that it has always struck him as extraordinary,³ and Sir James Mansfield says that the profession have always wondered at it,⁴ the case is, professionally speaking, a fail-

¹ Advisory opinions of the justices, even when constitutionally required, are not part of the law. *Green v. Comm.*, 12 All. 155, 164.

² 4 Co. 119 b.

³ Op., *Brummel v. McPherson*, 14 Ves. Jr. 173.

⁴ Op., *Doe v. Bliss*, 4 Taunt. 735.

ure. The result is that, while in all other professions the half of art may be taught, but the artist needs the whole, the art of deciding cases at common law is limited to that part which can be taught. What the judge or the lawyer cannot explain to some one else, he has very little use for. Every one has heard of the dryness of the law, and this is what the expression means. The lawyer instinctively limits his point of view and his mental processes to those that are transferable, to those that he can explain and teach to some one else. It may perhaps be suggested that all reasoning is transferable so that another can understand it. But if the intellectual ability to deal with new data is taken as the test for reasoning, this is very far from true. Reasoning in this sense has two steps: first, sagacity, or the ability to pick out the important facts which generally constitute the minor premise of the syllogism; and second, learning, that is, the ability to recall readily all the known consequences, concomitants, and implications from those facts which generally constitute the major premise.¹ The first step is the more difficult one. It is the part that requires insight; it is the part that cannot be taught. Take, for instance, a decision in another profession. On the third day at Gettysburg, General Hunt, the Federal Chief of Artillery, came to the conclusion that the Confederate cannonade was intended to produce a reply from the Union guns until their ammunition was exhausted, prior to an advance of the Confederate infantry in force. He accordingly applied to headquarters for permission to cease firing, that he might reserve the Union ammunition.² The correctness of his decision is now a matter of history. The major premise, the rule that when the enemy is trying to exhaust your ammunition, you must reserve it, is something that any man could learn. The minor premise, the fact that the enemy was then and there trying to exhaust the Federal ammunition, was a fact to be picked out from all the perplexing incidents of a great battle,—a fact that could not be taught, and that at least one corps commander on that day failed to realize.³

Suppose, now, for a moment, that General Hunt, when he went to headquarters, instead of going as a soldier to a soldier who knew how to value a soldier's opinion, had felt the burden on him

¹ James, *Psychology*, pp. 353 *et seq.*

² *Battles and Leaders of the Civil War*, Vol. III. pp. 372-374.

³ Hazards' batteries (the artillery of the Second Corps), acting under instructions from their corps commander, had exhausted their long-range projectiles before the Confederate infantry began to advance, and with the exception of a few shots were silent until the infantry was within canister range. *Ib.* 375.

to establish his position by evidence that would appeal, not to his mind, but to the mind of some one else. What would have become of his decision in that case? Could he have fully explained, even to himself, much less to anybody else, precisely why he thought as he did? He was a personal friend of a gentleman on the other side, and they had studied the uses of artillery together before the war. Could he have explained, even to himself, the precise extent to which the result of this intimacy influenced his decision, or of half a dozen other similar considerations? And yet no one doubts that the value of a decision in any other profession except the law lies in just such considerations as these,—considerations that a lawyer necessarily disregards. Evidence that appeals to his mind alone is for him useless. His work deals with what is transferable,—with what he can explain and teach to some one else. His highest title is Learned. The rest of the work, the part where sagacity and insight are required, he turns over to the jury. And the line between the functions of the court and those of the jury follows very closely the line dividing matter decided by learning, from matter decided by sagacity. It is often said that the court decides matters of law; but the court also decides all those questions of fact which require uniformity, that is, all those matters where a decision in one case can be readily made by following a decision in a previous case.¹ On the other hand, where there is no opportunity for precedent or learning, the questions are left to the jury,—questions of law as well as of fact. In a suit for negligence every single thing that every person, in any way connected with the accident, did, may be known and undisputed, and the case may be reduced to a question of conduct, pure and simple. But if the accident occurred in the management of some new machine or some new enterprise, or when the circumstances are so complicated as to present a new situation, “even if the facts are undisputed, the question whether either or both of the parties were at fault is for the jury.”²

¹ Prof. J. B. Thayer, *Law and Fact in Jury Trials*, HARVARD LAW REVIEW, iv. 159-161.

² *Kerrigan v. West End St. Ry. Co.*, 158 Mass. 305. How far the repugnance to new facts is characteristic of lawyers learned in systems other than the common law may perhaps be doubted. The reader will at once recall Lord Mansfield's delicate scorn when he observed that the Roman tribunals at once, and the English at last, decided according to the undisputed intent of the testator, which was manifest on the face of the will, and yet not categorically set down in words. *Op. in Frogmorton v. Holliday*, 3 Burr. 1618, 1624.

Many instances of the effect of this devotion to precedent will occur to the reader, the inferior nomenclature of the law being perhaps the most common.¹ But there is one instance so striking that I think it worth while to mention it at length. Before the case of *Priestly v. Fowler*,² there was a rule of conduct, known now as the fellow-servant rule, so regularly observed that the courts had never had occasion to pass on it. A servant simply never thought of suing his master for injuries caused by the negligence of a fellow servant. *Priestly v. Fowler* was decided in 1837. A little before this time machinery had made its appearance as a factor in civilization, and business corporations were formed to put it in general use. There then grew up a class of persons employed in operating this machinery and earning dividends for these corporations, a class now called employees,³ which had not before existed. They were as different from servants as servants were from soldiers. The servant occupied a close personal relation towards his master, ministering to his master's wants and doing his master's bidding, and fighting in his defence, if necessary.⁴ A son could not do much more,⁵ and a loss of service meant the loss of much that a son might do for his father.⁶ In short, the relation was that of a status, and the servant owed his master a certain allegiance. To kill his master was more than murder, it was petit treason.⁷ This close personal relationship gave the conception of a servant a dignity that made it at once suited to polite society and applicable to the highest relations. If you accepted a challenge, you stated that you were very much at the gentlemen's service. If you received a formal communication, you were informed at the end of it that the writer had the honor to be your

¹ "The ambiguity in the meaning of terms, which is perhaps the chief reproach of our law. . . ." Gray, *The Rule against Perpetuities*, page iv.

² 3 M. & W. 1.

³ According to Murray's Dictionary, "employé" first appeared in English in 1834, and was used by John Stuart Mill in 1848. "Employee" first appeared in America in 1854.

⁴ A servant could justify an assault in defence of his master. 2 Roll. Abr. 546.

⁵ Blackstone describes the duties of a child as "subjection and obedience" during minority. 1 Bl. Comm. 453.

⁶ An action for loss of service was (and is) the only remedy by which a parent could recover for injuries to a child. *Grinnell v. Wells*, 7 M. & Gr. 1033, 1041.

⁷ "And petit treason doth presuppose a trust and obedience in the offender, either civil, as in the case of a wife or servant, or ecclesiastical. . . ." Coke, 3d Ins. 20. "If a child live with his father as a servant," to kill his father was petit treason, but not otherwise. 1 Hale P. C. 380. It was petit treason to kill a former master from a grudge taken during the time of service. Ib.

very obedient servant. If you fought for your King, you were in his service; if you worked for him at home, you were still in his service. The King himself could be no more than a servant of his Lord and Master, the Redeemer. The worship of the Deity was Divine service. And the worshippers felt no incongruity between referring to themselves as "we, Thine unworthy servants," and to the Deity as "Our Father." Now strike out everything personal from the conception of a servant, everything that leads him to feel that he is doing something for somebody else, and what is left is the employee. There is not a single noble use of the word "servant" or "service," for which "employee" or "employment" could be substituted. It is not surprising, therefore, that employees at once acted differently from servants, and began suing their employers, both in England and America, for injuries caused by the negligence of co-employees.¹ The courts, however, were devoted to precedent. They were the legitimate product of the view that somewhere or other, "*in nubibus* or *in gremio magistratuum*, there existed a complete, coherent, symmetrical body of English law of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."² As a matter of course they looked for precedent; and almost as a matter of course they applied to employees the recognized principles applicable to servants, because servants were more nearly like employees than any other class of persons. But they were not just like employees. A true servant owed his master an allegiance that was not due to any mere contract. No contract could put a servant and a son on substantially the same footing, or make the murder of a master petit treason. The employee, on the other hand, was entirely a creation of contract, and the courts, in introducing a term into that contract, whether as to suing for

¹ *Murray v. S. C. R. R. Co.*, 1 McMullan, 355 (railway employee, South Carolina, 1841); *Farwell v. B. & W. R. R. Co.*, 9 Met. 49 (railway employee, Massachusetts, 1842); *Hutchinson v. York, Newcastle, & Berwick Ry. Co.*, 5 Ex. 343 (railway employee, England, 1850); *Bartonshill Coal Co. v. Reid*, 3 McQ. 266 (miner, Scotland, 1850).

Priestley v. Fowler, 3 M. & W. 1, presented the fellow-servant question rather by the pleadings than by the facts. The evidence relied on showed that the accident was due to the negligence of the master himself. After a verdict on this evidence for the plaintiff, the defendant made a motion in arrest of judgment for insufficiency of the declaration which set forth the negligence of a fellow servant; and prevailed. *Sword v. Cameron*, 1 Scotch Sess. Cas., 2d series, 493, 1839, seems also to have contained much evidence of the master's negligence.

² Sir Henry Maine, *Ancient Law*, 31.

injuries caused by the negligence of co-employees, or as to any other matter, were inevitably acting on one side of the bargain or on the other. When, therefore, the courts "implied" a term that the master should not be liable, there was only one thing left for the employee to do; that was to get the legislature to invent a term on the other side. The result was the English Employers' Liability Act, of 1880, which was followed in Alabama in 1885, in Massachusetts in 1887,¹ and later in other States.

Not the least interesting part of these acts are the clauses restricting them from having any application to real servants. What the courts confounded, the legislature was able to keep separate. The result is that the fellow-servant rule is in precisely the same position to-day as it was at the beginning of the century.

G. Hay.

¹ 43 & 44 Vict. ch. 42; Ala. Code, 1886, pars. 2590-2592; Mass. Acts of 1887, ch. 270.

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THE LAW SCHOOL. — The Law School opens with an entering class of about the same number as last year. Full statistics will as usual appear in the December issue.

In the last annual report to the Board of Overseers the Committee on the Law School recommended especially that the staff of instructors be increased, that the number of students in the classes be diminished, and that more attention be paid to common-law pleading. It is interesting in this connection to note the changes in the curriculum. Professor Brannan, who has been a practising lawyer in Cincinnati, and for the last two years a professor in the Cincinnati Law School, will give the courses on Partnership and Bills and Notes. The Bemis Professorship of International Law, founded five years ago, becomes a reality in the hands of Professor Strobel, late Minister of the United States to Chili, who has also filled a number of other diplomatic positions. Thanks to the kindness of the Harvard Law School Association, the School this year has the unusual advantage of a series of lectures by Professor Dicey, Vinerian Professor of Law in Oxford University. One of the most gratifying announcements is that of Professor Williston's return. He will take the new course on Bankruptcy this year, and there seems every prospect that next year he will resume his full classes. Mr. Swift, a practising lawyer in Boston, and for several years United States Marshal, takes the course on Sales. Mr. Westengard, LL.B., 1898, will conduct the course on Pleading, and will take charge of three of the sections in Criminal Law. Professor Williams has resigned his chair, and Property II will be again conducted by Mr. Dodge. The course on Roman Law will be omitted. The new course on Patents will be given by Mr. Storrow, of the firm of Fish, Richardson, & Storrow. Damages, omitted last year, returns to the active list, as does New York practice. The Bail Courts, which were started last year to give practice in pleading, will be continued. Constitutional Law has become a three-hour course, and Carriers is increased

to two hours. Pleading, Property I, Torts, Bills and Notes, and Evidence are divided this year into two sections; Criminal Law has four divisions. On the whole, then, there appears to be a general development in the directions recommended by the Committee of the Board of Overseers.

GOVERNMENT OF TERRITORIES AND COLONIES. — The most important legal question brought into prominence by the war with Spain regards the attitude of the Federal Constitution towards government of newly acquired Territories. One branch of this question is wholly unsettled. In passing laws for Hawaii and for Porto Rico, is Congress to keep within the letter of the amendments, and the similar provisions of the Constitution itself, or is it free to establish whatever colonial system it sees fit? Two cases, oddly enough, have arisen during the year in regard to previously existing Territories which throw light upon the matter. In one of them the court had to pass upon the constitutional right of a criminal in the Territories to a trial by twelve jurors. *Thompson v. State of Utah*, 18 Sup. Ct. Rep. 620. The defendant committed larceny in Utah before it was admitted to the Union as a State. After Utah became a State he was tried and convicted by eight jurors, in accordance with a provision in the Utah constitution. If the prisoner had been entitled to a trial by twelve jurors when he committed the crime, the provision in the Utah constitution would, so the court held, be *ex post facto*, and void as regarded him. The court decided that the Sixth Amendment, guaranteeing a trial by twelve jurors, did extend to Utah as a Territory, and hence that the trial was invalid. The reasoning was comprehensive, and would seem at first sight to settle the question. But since a United States statute expressly extended the Federal Constitution to the Territory of Utah, the opinion of the court is merely an addition to the line of *dicta* that are to the same effect.

Another case, decided in the Circuit Court of Appeals, tends in the opposite direction. *Endleman v. United States*, 86 Fed. Rep. 456 (C. C. A. Ninth Cir.). The question was whether or not certain restrictive liquor legislation for Alaska was constitutional. The objection, among others, was made that the law amounted to a deprivation of property, and was therefore invalid. The court answered, not that this objection was based upon a misconception of the Fifth Amendment,—which would have been a very good answer, and herein lies the weakness of the decision,—but that this argument found its refutation in the fact that Alaska was not formed under the general terms of the Constitution, and that the law in question was justified by the full power of Congress over the Territories.

The point of difference is clear. Alaska and Utah may indeed be distinguished on the ground that when Congress formed the territorial government of Utah and admitted a representative, by that act, even in the absence of an express statute, it extended the constitutional provisions to Utah. In the case of Alaska no such extension has been made. Alaska would thus be the basis by which to judge Porto Rico. No distinction of this sort, however, is hinted at in the Supreme Court decisions, and it is not likely to be made. The probability is that the *dicta*, of which the Utah case gives an example, will be followed and applied to the colonies. Yet it is not too late to point out that there is no authority which has given at all an adequate treatment to the matter. Mr. Justice Bradley himself

admitted that the personal rights granted by the Constitution extended to the Territories only by necessary inference. *Mormon Church v. United States*, 136 U. S. 1, 43. But why, it may be asked, is this inference necessary? If it is necessary, it should apply equally to the control of tribal Indians; but in dealing with them Congress has never felt itself limited by the amendments or by the analogous clauses in the Constitution itself. On principle, the Constitution is not to be regarded as a curb on a dangerous legislature, nor did the framers so regard it. Perhaps they never thought of colonies except with vagueness; but if they did, they surely did not intend to set up hard rules for their government. Much less were the amendments intended for the present contingency, being framed for what was felt to be a lack in the existing state of affairs, to protect the people of the States then existing, and possibly the subsequent States that might be admitted. 2 Lloyd, *Debates of Congress*, 224, 227. When colonies come, we cannot suppose that the Constitution or its amendments were meant as checks upon the nation's necessary political experience, and we should avoid any inference tending to give them that effect. Politic or impolitic as the possession of colonies may be, Congress should be unfettered in devising a system of laws for them.

THE LIABILITY OF LANDOWNERS TO CHILDREN. — The conclusion was reached in a recent leading article that upon principle the law ought not to impose upon a landowner a special liability to children entering his land without permission, although the children were attracted by his method of making beneficial use of his premises. 11 HARVARD LAW REVIEW, 349, 434. There is upon this question a remarkable conflict of authority. The line of decisions has attained a certain notoriety as the "turn-table cases;" but an exhaustive review of the authority must include, as did the principal article, an examination of collateral cases where the injury was the result of other beneficial user.

In the few months since the publication of the article referred to the main question has been considered in several decisions. Of first importance are the decisions in jurisdictions where the question was yet an open one. In the very case of injury from a turn-table two New Jersey courts, — the Supreme Court and the Court of Errors and Appeals, — declare in able opinions, though with dissent in each case, that there is no special duty cast upon the landowner to protect the child. On the other hand, the Illinois court, in the case of an injury in a grain elevator, evidently inclines to the opposite view. In Michigan, the court distinguishes an unguarded street car from a turn-table; yet the decision notes the conflict of authority, and cautiously inclines toward the decisions for the landowner. Again, the North Dakota court held for the landowner in the case of an injury to a child by coming in contact with moving shafting; and in a *dictum* an opinion is clearly indicated adverse to the turn-table cases. Upon the whole, then, these last cases distinctly follow the tendency of the decisions of late years to deny that the landowner is under any special liability to the child. *Tyress v. New York, S. & W. R. R. Co.*, 40 Atl. Rep. 614 (N. J. Sup.); *Delaware, L. & W. R. R. Co., v. Reich*, 40 Atl. Rep. 682 (N. J. C. A.); *Kaumeier v. City Electric Ry. Co.*, 74 N. W. Rep. 481 (Mich.); *O'Leary v. Brooks Co.*, 75 N. W. Rep. 919 (No. Dak.); *Siddall v. Fansen*, 48 N. E. Rep. 191 (Ill.).

When a State has once committed itself to the turn-table doctrine that

State cannot be expected to depart from it upon the precise facts; but in such States the policy first declared by Minnesota is followed, and the courts refuse to extend the principle to cases of other beneficial user of land, however undistinguishable those cases be in principle from the turntable cases. The case for the child will receive some support from a late English decision that a landowner is under a special liability to keep that part of his premises which abuts upon a highway safe for children. Recent American authority, however, upon the collateral question, inclines wholly the other way. Indeed, it commends itself to common sense that "a landowner cannot be bound to guard every stairway, shed, tree, and open window so that a child cannot climb to a precipitous place and fall off," or "every pond and excavation so that he fall not in," or "every switch yard and mill so that he do not enter," or "every coil of rope on shipboard, that he be not entangled." And so the several cases hold. *San Antonio & A. P. R. R. v. Morgan*, 45 S. W. Rep. 189, s. c. 374, s. c. 46 id. 28 (Tex.); *Harred v. Watney*, 78 Law Times Rep. 788; *Hackney v. Wolloston*, 75 N. W. Rep. 1037 (Minn.); *Stendall v. Boyd*, 75 N. W. Rep. 735 (Minn.); *Jackson v. Louisville & N. R. R.*, 46 S. W. Rep. 5 (Ky. C. A.); *Buck v. Amory Co.*, 1 N. H. Reporter, 182.

The general result of these late authorities is to eliminate the fiction of an "implied invitation" or "allurement," or a "constructive intent" from the argument for the child, and to eliminate the theory of the absolute immunity of the landowner from obligation to trespassers from the argument for the landowner. There remains a clear issue of public policy: does the danger of occasional harm to children outweigh the benefit to the community of leaving owners unfettered in making beneficial use of their land?

THE RIGHT TO PRIVACY. — It has long been public opinion that there must be found some principle of law to protect the privacy of the individual from the paragraphs, caricatures, and advertisements of the public print. A development in the law to meet this opinion would seem to be arrested by a recent decision in the Queen's Bench Division. *Dockrell v. Dougall*, 78 Law Times Rep. 840. In this case the plaintiff was a physician, the defendant, the owner of a medicine called Sallyco. In an advertisement of his medicine the defendant published of the plaintiff, with substantial truth, but without authorization: "Dr. Morgan Dockrell, physician to St. John's Hospital, London, is prescribing Sallyco as an habitual drink. Dr. Dockrell says nothing has done his gout so much good." For this the plaintiff brought an action; but the suit was dismissed upon the ground that there was no injury to the plaintiff's property or reputation.

The present actions for defamation fail to give a remedy in two classes of cases where there may often be actual wrongs. When a statement is false but is neither libel *per se* nor a cause of pecuniary loss, and when a publication is true, there are no actions for defamation. The existence of this unredressed residue in the law governing publication has given rise to the question whether the modern law does not recognize something in the nature of a right to privacy to protect personal appearance, sayings, acts, and personal relations from unwished publicity. This hypothesis of a right to privacy has appeared by way of *dictum* in late American reports. *Schuyler v. Curtis*, 174 N. Y. 434. The tendency of English authority has also been definitely in the same direction until

the refusal of a remedy in the principal case. *Prince Albert v. Strange*, 2 De G. & Sm. 652. The general result has been that with various reasons and in varying ways relief has been given in the case of some outrages against privacy; but the existence of a special category of rights to privacy has not been clearly realized, or the limits precisely defined. *Dixon v. Holden*, L. R. 7 Eq. 488.

The principle upon which a right against an invasion of privacy depends appears from a simple analysis of rights. Even crudest common law protected the person from more than mere batteries: it considered assaults and insults trespasses as well. The essential element in the trespass was the invasion of the person against the person's will. As sensations grew more intense, that became an invasion of the person which a ruder age did not so consider. The redress for the invasion of privacy may then well be a modern phase of the protection given to the person since the ancient trespass. If this view be correct, any publication which invades the privacy of a private individual, or such privacy of a public individual as he had not forfeited by his position, is a *prima facie* injury without more damage.

MANDAMUS TO A GOVERNOR. — New York State has joined the ranks of those who deny that a State court can control the governor by mandamus. *People v. Morton*, 50 N. E. Rep. 791 (N. Y.). The governor of New York is *ex officio* one of the Trustees of Public Buildings. In this capacity he is bound under a State statute to give preference to discharged Union soldiers as servants in the Capitol buildings, and, moreover, not to remove them except upon proof of incompetency. The statute is stringent; it allows the soldier to enforce the rights thus conferred by mandamus. The relator in the principal case was a discharged Union soldier who ran the elevator in the New York Senate building until he was removed without cause. He thereupon applied for a mandamus to compel the trustees, among them the governor, to reinstate him. The Court of Appeals, however, with a single dissent, held that the mandamus against the governor could not be granted, and contented itself with a simple affirmation that the relator had been improperly removed, and was entitled to be reinstated.

Questions of this sort are what test the balance of our constitutional form of government. Some courts, following the *dictum* of Chief Justice Marshall, that it is not the office, but the character of the act to be performed, that turns the scale, while refusing to interfere with the executive in regard to acts which call for the exercise of his discretion, issue commands to a governor to do acts in regard to which he has no choice when once he has read the statutes and applied the rules to the facts before him. *Tennessee & Coosa R. R. Co. v. Moore*, 36 Ala. 380; *Marbury v. Madison*, 1 Cranch, 380. But is not this proceeding a farce? Without a resort to the fiction invoked by Mr. Justice Haight in the principal case, that the governor is the successor of the king at common law, — which with all deference he is not, but rather an officer co-ordinate with the court, to both of whom separate functions are delegated by the sovereign people, — without the aid of that fiction, objections to this mandamus are revealed by a study of the theory of the Federal and State constitutions. Co-ordination and interdependence of the different branches of the government are the rule. Although the courts have the power of declaring what the law is, and so far seem to be above

the executive, who must apply the law, this superiority extends no farther. It is a concession necessary for the consistency of government. The judicial is really the weakest of the three departments, and depends upon the executive for its backbone. Deprived of this source of strength the court is powerless against any one, not to speak of the executive itself. Any disregard of a mandamus by the chief executive the court could not punish, and the result of issuing the mandamus could be only to bring the court into contempt. *The State v. The Governor*, 25 N. J. L. 331. This reason applies as fully to the governor of a State, within his own sphere, as to the President of the United States. Each in his way is supreme. It is idle, moreover, to draw distinctions between ministerial and discretionary acts. Every act involves a certain exercise of judgment, and the distinction can be only one of degree. The chief executive of any State in the matters intrusted to him is his own judge, and claims upon him for the performance of his official duty are beyond the cognizance of the courts of his State. If he ignores the law, impeachment, not mandamus, is the remedy.

THE RIGHTS OF UNBORN CHILDREN. — The question whether an unborn child has civil rights, — whether an infant may recover damages for injuries received before birth, — is a rare one in the law. It was squarely raised, and decided against the child, in *Dietrich v. Northampton*, 138 Mass. 14, and discussed in *Walker v. Gt. Northern Ry. Co.*, 28 L. R. (Ireland), 69. It has now been brought up again in *Allaire v. St. Luke's Hospital*, Appellate Court, First District of Illinois, 30 Chic. Leg. News, 333. There the plaintiff's mother was received by the defendants, a lying-in-hospital, for treatment during child-birth. The defendant's neglect, — which was clearly tortious as to the mother, — was the direct cause of an injury to the plaintiff while still in the womb. It is hard to imagine a case in which the facts would be more favorable to the child and more likely to prejudice a court, but it was held that the child could not recover for his injury.

The position of a child *en ventre sa mere* in the other departments of the law gives little sanction to a proposition for granting them civil rights. They are considered in the law of property, but their rights do not come into existence until birth and then relate back. This fiction of relation does not involve any idea of a child *en ventre sa mere* as a separate entity, and at best is a special equitable provision. The criminal law is harder to understand. It is murder or manslaughter if one injures a child *en ventre sa mere*, and that child be born alive, and later dies of the injury. 3 Inst. 50. *Rex v. Senior*, 1 Moo. C. C. 346. It is argued that every murder must of necessity be a tort, and that therefore there has been a tort against the child in the womb. The answer to this contention probably is that the criminal law has made an error, though a very natural one, in placing this crime against the child in the category of murder; that the fundamental conception of homicide is the application of some force to a human being, a member of society; that this crime properly belongs in the category with the offence of procuring an abortion. The cases that have called the crime murder or manslaughter have stated no reasons, and the suspicious principle clearly forms no sound basis for analogy.

And not only would it be without precedent in law to allow the child to recover damages for an injury sustained before birth, but it would create

an anomalous right. If the child has a right of action it must arise at the time of the injury, but at that time it is uncertain whether the child will be born alive, so that a right of action is created which is contingent on a subsequent irrelevant fact. Strong reasons of public policy too are against allowing this new right of action, — infinitely difficult questions of fact would come before juries, and the courts would be filled with cases brought in bad faith.

THE PAROL EVIDENCE RULE APPLIED TO WILLS. — An interesting case regarding the interpretation of a will has recently been before the Supreme Court of Pennsylvania. *In re Root's Estate*, 40 Atl. Rep. 818. The will in question gave "unto my nephew, William Root, the sum of \$1,000." The testator had a true nephew, William Root. His wife also had a nephew of the same name. To explain this will, evidence was offered in the Orphan's Court of the surrounding circumstances and the declarations of the testator tending to show that the wife's nephew was intended to take the legacy. The Orphan's Court admitted the evidence, and decided in favor of the wife's nephew. The Supreme Court, however, reversed this decision on the ground that when one person exactly meets the description in the will it is error to admit evidence of any kind to show that another person not exactly meeting the description was intended.

Half a century ago this decision would have met with general approval; but since that time there has been a steady growth of opinion that the rule here laid down is too narrow, and that whatever may be the case as regards direct declarations of intention, at least the courts may look fully into all other extrinsic circumstances. An instance of this growth appears in *Abbot v. Middleton*, 7 H. L. C. 68, where Lord St. Leonards said regarding the construction of a will, "You are, by the settled rule of law, at liberty to place yourself in the same situation in which the testator himself stood." In a subsequent case, Lord Cairns expressed himself to the same effect. *Charter v. Charter*, L. R. 7 H. L. 364. *Grant v. Grant*, L. R. 5 C. P. 727, was a case exactly parallel to the Pennsylvania case. Evidence was there received to show that the wife's nephew was meant, and Lord Blackburn distinctly repudiated the doctrine now urged by the Pennsylvania Court. To turn to American authorities, the words of the will considered in *Patch v. White*, 117 U. S. 210, exactly described an existing lot of land; yet when it appeared that this lot was not owned by the testator, the court righted the mistake by the aid of parol evidence. In England, then, and in the Supreme Court of the United States the strict rule laid down by the principal case is no longer adhered to.

On principle, the Pennsylvania position is hard to support. The aim of the law of construction is to give effect as nearly as possible to the intention of the testator. This aim is measured on one side by a rule of evidence established by time, that the direct declarations of the testator must not be regarded in the search for his meaning. On the other side, it is limited by the Statute of Frauds, which requires that this meaning when found be expressed in writing. Within these bounds no rule is established by precedent which places further restraints upon the interpreter; and in reason there seems to be no need for such a rule. Written words are but the symbols of the writer's meaning, and at best imperfect symbols. The law requires not a perfect but only a sufficient expression, and this there may be although the words are not used in their strict

grammatical sense. It seems arbitrary to a degree to refuse effect to the author's meaning when sufficiently expressed, simply because the language used might have been a better expression for another meaning if the author had entertained it.

ARREST OF MISDEMEANANTS. — The case of *Brown v. Weaver*, 23 So. Rep. 388 (Miss.), rules that when a deputy sheriff shoots a misdemeanant who is fleeing to escape after arrest he exceeds his authority, and that the sheriff and his bondsmen are liable for the act of the deputy. It is generally admitted to be law that if a misdemeanant flees before arrest an officer may not kill him, even if it is not possible to capture him in any other way; and the court in the principal case see no reason why the power of the officer should be greater after arrest. The life of a human being seems to the court a weightier matter in the scale of public policy than the failure of justice in regard to a petty offender. *Thomas v. Kinkadee*, 18 S. W. Rep. 854 (Ark.); *Reneau v. State*, 31 Amer. Rep. 626 (Tenn.).

The opposite view seems to find its sole exponent in Mr. Bishop, *Criminal Procedure*, vol. i. § 161, and note. Mr. Bishop's general argument is that it is necessary that the servants of the law have absolute power to enforce its commands. In a polemic note he puts the hypothetical case of a pugilist successfully defying a court because its servants have not the power to kill as a last resort. He relies also on the admitted rule of law that if any man, misdemeanant or felon, resists a legal arrest and is killed in the struggle, the officer is not liable, civilly or criminally. The cases the author cites do not support his contention. Such arguments fail to convince the ordinary mind. Surely the majesty of the law is not greatly lessened when an officer refrains from shooting his prisoner, nor is it probable that there would be any marked change in the general conduct of misdemeanants if they learned that officers had no power to kill them. On the other hand, to put into the hands of an ordinary officer of uncertain discretion a power to kill fleeing and unresisting misdemeanants is to create a very grave and immediate danger.

It seems clear, then, not only that the result which the case reaches is sound, but also that the case is far from the line. The rigid rule that an officer may kill a fleeing felon, though not a misdemeanant, — adequate as it may have been in the old law, — is not satisfactory to-day. Modern ideas of public policy, vague and incapable of definition as they are in this regard, tend to limit the officer's power toward felons as well.

IS A VIEW BY THE JURY PART OF THE TRIAL? — A trial for murder is so laborious and protracted an affair that some courts are inclined to search far for reasons by which to avoid setting aside a trial once held for a mere technical error of procedure. The case of *People v. Thorn*, 50 N. E. Rep. 947 (N. Y.), is perhaps an example of this inclination. A murder had been committed under particularly atrocious circumstances. In the course of the trial, the jury were sent to take a view of the premises where the crime was committed. The prisoner at his own special request did not accompany them; but when the verdict of guilty was finally rendered, he raised the objection that he had not been present through the whole trial, and was therefore entitled to be tried again. The

Court of Appeals overruled this objection (O'Brien and Bartlett, JJ., dissenting). The possibility of the prisoner waiving his rights was passed over, and the decision was rested on the ground that he had, as a matter of fact, been present during the whole proceeding, that the view was not a part of the trial, and "that the knowledge acquired by the jury in inspecting the premises was to enable them to better understand the evidence and not to obtain original testimony." The weight of authorities seems against this position: *People v. Palmer*, 43 Hun, 401; *People v. Bush*, 68 Cal. 623; and the weight of reason is also opposed. In this particular case the absence of the accused does not seem to have influenced the decision. But under different circumstances it might well prove of great importance to have the opportunity of observing the conduct and actions of the jury when taking the view. Suppose, for instance, between the murder and the trial the premises had accidentally become changed in appearance, the jury noting the discrepancy between the testimony and the facts might draw conclusions of vital moment against the defendant's witnesses. If it be argued that the jury are forbidden by the court to draw conclusions from what they see, the answer is that it is impossible to enforce obedience. Throughout the whole trial the jury must necessarily be comparing the testimony they hear with what they have seen. It is noteworthy, moreover, that when handwriting, blood-stains, or footprints are shown the jury, it is called the production of real evidence, and no one contends that examination by the jury of these matters is not a part of the trial. A "view" is hard to distinguish from this so-called real evidence. Giving the jurymen a view of the premises is something more than giving him a mere instrument, like an eyeglass or an ear-trumpet. It is furnishing him with a basis for inference which will unavoidably be utilized. Hard though it seems to nullify a whole proceeding for such a small reason, yet it is better so, than to set a precedent of disregarding the rights of persons accused of crime.

WHEN IS A SHIP A TOTAL LOSS?—It remained for a late decision of the House of Lords to declare for the first time that a sunken ship is to be considered for the purposes of insurance as a total loss. *The Blairmore Co. v. Macredie*, 1898, App. Cas. 593. Doubtless no marine insurer was ever so bold as to contend otherwise. In that case the ship "Blairmore," insured for £15,000, sunk in a squall in San Francisco Harbor. The owners declared her a total loss, and formally abandoned her. Thereupon the underwriters raised her at an expense of £9,500, estimated that she could now be repaired for £1,500, and offered the ship and that sum to the owners. The owners refused, and brought suit for the full amount of the insurance. They contended that the ship was, and remained, a total loss. The underwriters practically conceded that the loss was once total, but claimed that when the ship was raised the loss became a partial one. The case was finally carried to the House of Lords. Their Lordships differed much in their reasons for their decisions, but the result was that the owners succeeded.

A ship is considered a constructive total loss under circumstances when a prudent uninsured owner would abandon her. *Adams v. Mackenzie*, 13 C. B. N. S. 442. Now in the principal case it is seen that a prudent owner would have abandoned the sunken but not the raised ship. The problem presented, then, was whether the rights of the

insured were finally fixed when he gave notice of abandonment, or whether those rights could be affected by a subsequent change in the condition of the ship. It was arguable from certain early cases of ships captured and recaptured that what was once a constructive total loss could thus become a partial loss. *Hamilton v. Mendes*, 2 Burr. 1199. No English case, however, had gone to the length of the contention of the underwriters that they could themselves expend money upon a ship which was once a constructive total loss, and that by improving her condition to such an extent that her owner if uninsured could no longer with reason think of abandoning her they could change her from a total loss to a partial loss, and thus escape full liability. The result would be that the distinction between a constructive total loss and a partial loss would no longer depend upon the question, when would a prudent uninsured owner abandon his ship? but, how much would an astute underwriter expend to turn a constructive total loss into a partial one? However, the subtle contention failed.

The problem in insurance is always the practical one, how did the parties understand their contract? It has indeed been the theory of the text-books that a ship is an actual total loss only when it ceases to exist *in specie* as a ship. But as a matter of fact the owner doubtless understood that it would be considered an actual total loss if his vessel sunk. The title to the wreck would then pass to the underwriters, and the risk of marketing it be upon them. As the Lord Chancellor declared, when his vessel reached the bottom of the sea the owner expected to be quit of it, though modern mechanical skill might bring it up again. At all events, the decision must effect the great object in mercantile law, — certainty.

RECENT CASES.

BILLS AND NOTES — CHECKS — NOTICE TO DRAWER. — The holder of a check brought an action thereon against the drawer, but the declaration did not allege that notice of its dishonor was given him. On the demurrer to a declaration, *held*, that judgment be given for the plaintiff. *Spink & Keyes Drug Co. v. Rayn Drug Co.*, 75 N. W. Rep. 18 (Minn.).

To charge the drawer of a bill, due notice to him must be alleged and proved by the holder. On the other hand, the drawer of a check must have suffered loss by reason of no notice being given him in order to escape liability on that ground. 2 Daniel, Neg. Inst. § 1587. Therefore the court properly holds that the burden of establishing loss is upon the drawer, and that he should allege and prove "no notice." *Harbeck v. Craft*, 4 Duer, 122. He is then assisted by a presumption that damage was suffered by him. *Ford v. McClung*, 5 W. Va. 156. Yet this presumption only shifts to the holder the burden of adducing evidence to rebut it, and the burden of proof remains throughout on the drawer. For other reasons it seems that "no notice" should be treated as an affirmative defence, not only in the case of checks, but also in that of all bills and notes. The cause of action is complete upon default at maturity, even though no notice be given. This is shown by the fact that the drawer or indorser may thereafter waive the laches of the holder.

BILLS AND NOTES — TRANSFER — NOTICE. — The defendant made a promissory note payable to A, who indorsed it to the plaintiff. The defendant was induced to make the note by the fraudulent representations of A. *Held*, that to recover on the note the plaintiff must take it without such notice of the fraud as would put a prudent man upon inquiry. *Limerick National Bank v. Adams*, 40 Atl. Rep. 166 (Vt.).

In accord is the early decision in England of *Gill v. Cubitt*, 3 B. & C. 466. That case has since been overruled by *Goodman v. Harvey*, 4 A. & E. 870, and is *contra* to the great weight of authority in this country. *Johnson v. Way*, 27 Oh. St. 374; *Hotch-*

kiss v. National Bank, 21 Wall. 354. The better view seems to be to determine whether the particular purchaser acted in good faith and not to establish a standard of care in such a case. The negotiability of such instruments is thus greatly promoted, which is desirable in the interests of commerce.

BILLS AND NOTES — UNCERTAINTY IN AMOUNT. — A promissory note for a certain sum provided for the payment of attorney's fees in case of suit at maturity on default. *Held*, that this provision renders the note uncertain in amount and so not negotiable. *Roads v. Webb*, 40 Atl. Rep. 128 (Me.).

The better opinion seems *contra*, as well as the weight of authority. See 11 HARV. LAW REV. 61.

CONFLICT OF LAWS — NON-RESIDENT — GARNISHMENT. — A debt due a citizen of Alabama, and payable in Alabama, was garnished in a Tennessee court. Notice was served on the principal defendant by publication. He did not appear, and judgment went by default. *Held*, that the garnishee court had no jurisdiction over the debt, and its proceedings were void. *Louisville & Nash R. R. Co. v. Nash*, 23 So. Rep. 825 (Ala.).

It has been held that for the purpose of garnishment a State has the power to fix by statute the situs of a debt at the domicile of the debtor, although the creditor is a non-resident. *Williams v. Ingersoll*, 89 N. Y. 508; *Bragg v. Gaynor*, 85 Wis. 468. The principal case, in holding the situs is not affected by the enactment of statutes, has also the support of authority. *Ill. Cent. R. R. Co. v. Smith*, 70 Miss. 344; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375; *Lovejoy v. Albee*, 33 Me. 414. The latter view commends itself to sound reason. There is nothing tangible in a debt to attach. The court can only gain jurisdiction over it through the parties. The creditor controls the debt. It is payable to him, and he may retain or assign it. It seems, therefore, that the court must ordinarily have jurisdiction over the creditor in order to exercise it over the debt, as the principal case holds. If, however, the court had controlled both the debtor and the place of payment, it would have had jurisdiction over the debt, for in that case the debt would have been entirely under its control.

CONSTITUTIONAL LAW — CORPORATIONS — STATUTE VALIDATING ULTRA VIRES CONTRACT. — *Held*, that a statute, validating an *ultra vires* contract made by a county, is not an infringement upon the judicial power and is not unconstitutional. *Ersikine v. Steele County*, 37 Fed. Rep. 630 (Circ. Ct., N. Dak.).

The enactment is valid in either of two lights. In the first place, it is held that, even in the case of a private corporation, an *ultra vires* contract may be legalized by a subsequent act of the legislature. *White Water, etc. Co. v. Valette*, 21 How. 414, 425; 2 Morawetz, Private Corporations, 2d ed., § 651. Such a statute does not usurp the functions of the judiciary; but, as is said in the principal case, it gives to the contract the one element of vitality which it previously lacked, namely, the assent of the sovereign. But see *Reiser v. Wm. Tell Saving Fund Ass.*, 139 Pa. St. 137. In the second place, the decision under review may be supported as a valid exercise of the control possessed by the State over the funds of a municipal corporation. 1 Dillon, Municipal Corporations, § 62.

CONSTITUTIONAL LAW — EX POST FACTO LAWS. — A New York statute provided that any one practising medicine after conviction of a felony should be guilty of a misdemeanor. Plaintiff in error was indicted for practising medicine after the enactment of the law, having been convicted of felony and punished before its passage. *Held*, that he can be punished under the statute; the law is not in conflict with Art. I. sect. 10, of the Constitution of the United States, which provides that "No State shall . . . pass any . . . *ex post facto* law . . .," as inflicting additional punishment for crime, but is a valid exercise of the police power of the State. *Hawker v. People of New York*, 170 U. S. 189.

The distinction is here pointed out between a State law intended to create a punishment for past offences, and one intended to enact a test of fitness to carry on a profession affecting the public welfare. The latter type of legislation is a valid and common exercise of the police power of the State. The law in question in the principal case seems clearly to fall within the scope of this power, and the decision is in line with previous decisions of the Supreme Court. *Dent v. Post Virginia*, 129 U. S. 114; *Gray v. Connecticut*, 159 U. S. 74.

CONSTITUTIONAL LAW — INHERITANCE TAX. — The State of Illinois imposed an inheritance tax, which varied according to the amount of the legacy and according to the degree of relationship of the legatee. *Held*, that the tax does not conflict with that provision of the Federal Constitution which forbids the States to deny to any citizen the equal protection of the laws. *Magoon v. Illinois Trust & Savings Bank*, 18 Sup. Ct. Rep. 594. See NOTES, 12 HARV. LAW REV. 127.

CONSTITUTIONAL LAW — MANDAMUS. — *Held*, that a State court cannot issue a mandamus against the governor of the State to compel him to perform an official duty, whether or not that duty is a ministerial one. *People v. Morton*, 50 N. E. Rep. 791 (N. Y.). See NOTES.

CONSTITUTIONAL LAW — PRESUMPTION OF INNOCENCE. — A statute provided that upon a second conviction for certain crimes, a heavier penalty should be imposed. Defendant, being charged with robbery as a second offence, offered to admit the previous conviction, and asked to have evidence of it excluded from the jury. *Held*, that by imposing a different penalty for the second offence, it is made a new crime, and the first conviction must be proven to the jury to establish the new offence; and that it is not contrary to the Constitution of New York to submit proofs of the former conviction to the jury, because it may deprive the defendant of the benefit of the presumption of his innocence. *People v. Sickles*, 26 App. Div., Sup. Ct., 470 (N. Y.). Two judges dissenting.

Although the presumption of innocence has in recent times been held by most respectable authority to be affirmative evidence for the accused, *Cuffin v. United States*, 156 U. S. 432, 460, this appears to be the first time it has been judicially claimed that it could not be constitutionally weakened by evidence introduced in the first instance by the prosecution tending to show the accused's bad character. No authority is cited for this position, and it seems untenable. No one has any vested right to rules of evidence, and the legislature can change them at will, nor need it make them uniform for all kinds of crime. It is not held unconstitutional for the legislature to make the possession of certain property, or the doing of certain acts, presumptive evidence of the commission of an offence, legislation which must certainly weaken the presumption of the innocence of the accused. *People v. Cannon*, 139 N. Y. 32. The dissenting opinion is, perhaps, but another vindication of the present tendency to extend constitutional guarantees into fields they were never intended to include.

CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL IN TERRITORIES — EX POST FACTO LAW. — The defendant committed a felony in Utah while it was a Territory. After Utah became a State he was tried for this felony, and was convicted upon a verdict by eight jurors, as provided by the Constitution of Utah. *Held*, that the conviction was void, since the provision in the Utah Constitution, as applied to the defendant, was *ex post facto* and invalid. *Thompson v. State of Utah*, 18 Sup. Ct. Rep. 620. See NOTES.

CONTRACTS — GUARANTEE — DEATH OF GUARANTOR. — In consideration that the plaintiffs would discount bills for B, A guaranteed the account. *Held*, that this guarantee terminated, not on A's death, but when notice of his death reached plaintiffs. *Dodd v. Whelan*, [1897] 1 I. R. 575.

This case follows the decision in *Bradbury v. Morgan*, 1 H. & C. 249, and certain *dicta* in *Caulthart v. Clementson*, 5 Q. B. D. 42, and in *Harris v. Fawcett*, L. R. 8 Ch. 866. But *Offord v. Davies*, 12 C. B. N. s. 748, held that such a guarantee is determinable by notice from the guarantor, considering such a guarantee as only an offer for a series of unilateral contracts, and therefore revocable at any time as to discounts not yet made. This view, certainly the most natural one, leads inevitably to the conclusion that, since an offer cannot be accepted after the death of the offeror, the death of the guarantor revokes the guarantee at once. See *Jordan v. Dobbins*, 122 Mass. 168. Apparently there is only one way to reconcile the principal case with the result reached in *Offord v. Davies*. We may say that such a guarantee ripens into a complete contract upon the first discount; but, since the party guaranteed is not obliged to continue discounts, equity requires that the guarantor should have the right to withdraw by giving reasonable notice, unless prevented by some provision of the contract. This, however, seems a forced construction. See *Gay v. Ward*, 67 Conn. 147.

CONTRACTS — RESTRAINT OF TRADE — TRUST ACT OF 1890. Plaintiff contracted to convey to the defendant for a limited period the good-will of his freighting business, covenanting not to solicit freight or compete in the business during the term. In a suit for the purchase-money, *held*, that the covenant was not void under the Trust Act of 1890, and thus did not vitiate the contract. *Brett v. Ekel*, 51 N. Y. Supp. 573 (Sup. Ct., App. Div., First Dept.). See NOTES, 12 HARV. LAW REV. 129.

CONTRACTS — SHERIFF'S BOND — LYNCHING. — In a suit on a sheriff's bond, the plaintiffs alleged that their father, having been arrested on an accusation of murder, was intrusted to the sheriff's charge, and that, through the latter's negligent guarding of the prisoner, a mob was enabled to break into the jail and lynch the accused. On demurrer, *held*, that the declaration discloses no cause of action. *State, use of Cocking, v. Wade*, 40 Atl. Rep. 104 (Md.).

The peculiar features of the case render the decision of some theoretical and considerable practical importance. The opinion of the court is placed chiefly on the ground that a sheriff's duty of guarding a party under arrest is not imposed in any degree for the benefit of the prisoner or his family, but is owed to the public alone. Authorities directly in point are entirely lacking, but if the question should be elsewhere presented, the same decision would probably be reached. See *Cooley*, Torts, §§ 376, 393. This view, if accepted, disposes of the case. One of the judges, however, further holds that the suit cannot be maintained because, at common law, "in a civil court, the death of a human being could not be complained of as an injury," *Baker v. Bolton*, 1 Camp. 493; but it is more than doubtful whether this principle can be extended to actions of contract. *Tiffany*, Death by Wrongful Act, § 18. The ground taken by the other judge is certainly less open to attack.

CORPORATIONS — RAILROAD MORTGAGES — FORECLOSURE. — A railroad company issued three classes of bonds, each set constituting a first lien on one of the three divisions into which the road was divided, and a second lien on the other two. The mortgage provided that, in case of default, the trustee thereunder should proceed to sell first the road as an entirety, and then, if no acceptable bid were obtained, the three divisions separately. *Held*, that the court is not bound by this provision; but, upon foreclosure proceedings, may direct that the road be sold as an entirety absolutely and in the first instance. *Low v. Blackford*, 37 Fed. Rep. 392 (C. C. A., 4th Circ.).

The power of sale vested in the trustee is, of course, a merely cumulative remedy, and does not prevent the ordinary proceedings by foreclosure; but, on principle, any regulations which affect the substance as distinguished from the form of the remedy should be followed by the court when directing a foreclosure sale. The courts are, however, very jealous of any restrictions upon their discretionary powers in regard to foreclosure. *Jones*, Corporate Bonds and Securities, § 339. Indeed, a provision in a mortgage that the remedy under a power of sale should be exclusive, has been held void as ousting the courts of their jurisdiction. *Guaranty, etc. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137. But see *Chicago & Vincennes Ry. Co. v. Fosdick*, 106 U. S. 47. The trend of authority, therefore, seems to justify the decision in the principal case.

CRIMINAL LAW — ARREST OF MISDEMEANANTS. — A deputy sheriff shot a misdemeanant who was fleeing to escape after arrest. *Held*, that the deputy exceeded his authority, and the sheriff and his bondsmen are liable for his act. *Brown v. Weaver*, 23 So. Rep. 388 (Miss.). See NOTES.

CRIMINAL LAW — ASSAULT WITH INTENT TO RAPE — CONSENT. — *Held*, that an unsuccessful attempt to have connection with a girl below the age of legal consent cannot be assault with intent to commit rape if she in fact consents. *Hardin v. State*, 46 S. W. Rep. 803 (Tex., Cr. App.).

The case is in line with the minority of the American decisions on this point, providing the statutory definition of assault in Texas does not differentiate it from the common-law cases, — a feature which the court did not consider; it overrules two previous Texas cases, *Allen v. State*, 36 Tex. Cr. Rep. 381; *Callison v. State*, 37 Tex. Cr. Rep. 211. The English cases and a few American ones maintain that the laws regulating the age of consent in rape merely declare that consent obtained from a girl below that age cannot be set up as a defence, and do not mean that the girl is actually incapable of consenting to the carnal act. Absence of consent being the very gist of an assault, when once the girl has consented to the act, the defendant cannot be punished for assault with intent. *Reg. v. Martin*, 2 Moo. C. C. 123; *Smith v. State*, 12 Oh. St. 466. The majority of American cases, however, hold that the law conclusively implies the girl's incapacity to consent to the carnal act, and that this incapacity extends also to render her incapable of consenting to those acts which, in the absence of her consent, would constitute an indecent assault. *People v. Gordon*, 70 Cal. 467.

CRIMINAL LAW — VIEW OF PREMISES — PRESENCE OF ACCUSED. — *Held*, that a view by the jury of the place where the crime was committed is not part of the trial, and the defendant may waive his right to be present. *People v. Thorn*, 50 N. E. Rep. 947 (N. Y.). See NOTES.

EVIDENCE — CONSTRUCTION OF WILLS. — The testator devised "to my nephew W. R." He had a true nephew W. R., and his wife also had a nephew W. R. *Held*, that parol evidence is not admissible to show that the wife's nephew was the person intended to take. *In re Root's Estate*, 40 Atl. Rep. 818 (Pa.). See NOTES.

EVIDENCE — DECLARATION OF VOTER — HEARSAY. — *Held*, that the declaration of a voter, made some time after the election, is inadmissible to prove for whom he voted. *Lauer v. Ester*, 53 Pac. Rep. 262 (Cal., Sup. Ct.).

The declaration was mere hearsay, and was clearly inadmissible. *Gilleland v. Schuyler*, 9 Kan. 569; *City of Beardstown v. City of Virginia*, 76 Ill. 34. In England the declarations of a voter as to his disqualifications were first admitted by Parliament in contests over seats in that body, at a time when the privilege of voting depended upon the ownership of a freehold. Such declarations were held to be against the proprietary interest of the declarant, and hence within an exception to the rule against hearsay. This English rule has been adopted by Congress, although in this country declarations as to disqualifications cannot be against the proprietary interest of the declarant, since the right to vote does not depend upon a property qualification; and as an extension of this rule the declarations of a voter as to how he voted are held admissible. McCrary, Elections, 4th ed., § 483 *et seq.* There are a few judicial decisions which sanction the same practice. *State v. Olin*, 23 Wis. 309. They are not to be supported, however, as they violate the fundamental rule of evidence that mere hearsay is not admissible.

LIFE INSURANCE—ASSIGNMENT—WAGERING POLICY.—W. insured her life in favor of her executors, administrators, and assigns. She then assigned the policy, according to a prior agreement, in consideration that the assignee pay the premiums. The assignee had no insurable interest in the life of the insured. *Held*, that a legally entitled beneficiary may assign a life-insurance policy to one having no interest. But that the facts in this case showed the assignment to have been a colorable one, the effect of the prior agreement being to make the assignee substantially the real applicant; the policy was therefore a wagering one, and the assignee could not recover on it. *Clement v. N. Y. Life Ins. Co.*, 46 S. W. Rep. 561 (Tenn., Sup. Ct.).

This decision represents the prevailing view in this country, that the assignee of the beneficiary of a life-insurance policy need have no interest in the life insured. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24. It also seems a correct interpretation of the facts that such a policy as that in the principal case is a wagering one. An arrangement, the effect of which is to make the apparent applicant a mask for the really interested party, who stands no chance of loss beyond his premiums, clearly makes a policy a gambling transaction. *Olmstead v. Keyes*, 85 N. Y. 593.

MARINE INSURANCE—TOTAL LOSS.—The ship "Blairmore," insured for £15,000, sunk in San Francisco Harbor. The owners formally abandoned her as a total loss. Thereupon the insurers raised her at an expense of £9,500, and claimed that the loss was now only a partial one. The owners refused to accept the ship. *Held*, that by the principles of marine insurance such a sunken vessel is a total loss. *The Blairmore Co. v. Macredie*, [1898] App. Cas. 593. See NOTES.

MORTGAGES—SUBROGATION—STATUTE OF LIMITATIONS.—The devisee of a mortgagor, by representing the estate to be solvent, induced plaintiff to take a deed of the mortgaged land, assuming the mortgage. Plaintiff later paid this to prevent foreclosure, and had it discharged. The estate proving insolvent, *held*, that plaintiff was entitled to be subrogated to the mortgagee's lien, but that as against him the Statute of Limitations ran from the maturity of the mortgage note, not from the time the mortgage was discharged. *Fullerton v. Bailey*, 53 Pac. Rep. 1030 (Utah).

The plaintiff's right to subrogation seems plain. *Spaulding v. Harvey*, 129 Ind. 106; *Edwards v. Davenport*, 20 Fed. Rep. 756. But in Utah apparently a mortgage lien is gone when the note secured by it is barred. So the question arises whether plaintiff can recover if the statutory period has elapsed since the note became due, which was some years before plaintiff paid it. The answer depends upon whether plaintiff by subrogation obtained a new right or succeeded to an old one, like an assignee. On the analogy of suretyship, plaintiff having, in order to protect his own interests, relieved the estate from a debt, would have a new quasi-contractual right to reimbursement from the estate. *Scott v. Nichols*, 61 Am. Dec. 503 and note. This, however, would not do him full justice because of the estate's insolvency. The court should have carried the analogy one step further, and said that as plaintiff freed the land from a burden, the land must recompense him by a new lien in substitution for the old one.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF SERVANTS.—Through the negligence of the driver, a sprinkling cart in the service of the defendant struck the plaintiff's buggy and injured the plaintiff. *Held*, that the defendant is not liable, as its servant was engaged in the discharge of a governmental duty of the defendant in promoting the public health. *Connelly v. Mayor of Nashville*, 46 S. W. Rep. 565 (Tenn., Sup. Ct.).

It is well settled that a city is not liable for damage caused by acts performed in its governmental, as distinguished from its corporate, capacity. As to what acts should be considered governmental, the authorities are not uniform. Goodnow, Municipal

Home Rule, c. 7. The act in the principal case seems to have been such as to warrant the decision, which is in accord with the trend of authority. *Burrill v. City of Augusta*, 78 Me. 118.

MUNICIPAL CORPORATIONS — PUBLIC NECESSITY — RIGHT TO COMPENSATION. — Village trustees burned a mill and destroyed a dam, to prevent a flood from damaging a highway and other property. *Held*, that the village is not bound to pay compensation, since the act was justifiable on the ground of public necessity. *Atken v. Village of Wells River*, 40 Atl. Rep. 829 (Vt.).

This case is in accord with authority, but it seems unfortunate in its result. *Field v. The City of Des Moines*, 39 Iowa, 575. In times of public danger individual rights of property give way to the higher laws of impending necessity, and an owner has no claim for reimbursement for property destroyed at such a time in the interests of the public. This seems unjust; the owner has been guilty of no legal wrong, and his property should not be confiscated. On principle, it would seem that, though the community should be allowed to destroy private property at such a time, it should pay for the benefit it has received at the owner's expense. See 3 HARV. LAW REV. 189.

PERSONS — INFANTS — COMPROMISE. — An infant, by his next friend, employed an attorney to bring an action. The latter compromised the suit, consenting to an entry of judgment and satisfaction on the record. *Held*, that the infant was bound by the acts of the attorney. *Beliveau v. Amoskeag Mfg. Co.*, 40 Atl. Rep. 735 (N. H.).

The question considered is whether an infant should be bound by such a compromise in a jurisdiction where an adult would be bound under similar circumstances. The court was unable to cite any decision directly in point, but has reached a very practical conclusion. The next friend is, in legal contemplation, an officer of the court appointed by it to act for the infant where he is under a legal disability. *Guild v. Cranston*, 8 Cush. 506; *Baltimore & O. R. R. Co. v. Fitzpatrick*, 36 Ind. 619. An attorney appointed by the next friend is, therefore, an ordinary attorney of record, and there is no apparent reason why his acts in this capacity should not bind the infant, as fully as they would bind an adult by whom he had been appointed. *Tillotson v. Hargrave*, 3 Madd. 494; *Tripp v. Gifford*, 155 Mass. 108.

PERSONS — MARRIED WOMEN — SEPARATE ESTATE. — *Held*, that a married woman may charge her separate equitable estate for payment of a debt for which she is liable only as a surety. *Natl Exchange Bank v. Cumberland Lumber Co.*, 47 S. W. Rep. 85 (Tenn., Sup. Ct.).

The decision has the support of the great weight of authority. *Schouler, Husband and Wife*, § 249. There seems to be no adequate reason why a married woman, who is allowed to bind her separate estate by contract, should not be permitted to do so in the capacity of a surety. Some courts, however, deny a married woman the right to bind her separate estate except by such contracts as are for the benefit of her estate, and hold that contracts of suretyship are not of that nature. *Perkins v. Elliott*, 27 N. J. Eq. 526. This construction is properly regarded in the principal case as too narrow to accord with the present position of married women in courts of equity.

PROPERTY — CONVERSION — DAMAGES. — A innocently cut trees on land of plaintiff, manufactured them into lumber, and then sold it to defendant. In an action of trover, *held*, that the measure of damages is the value of the lumber at the time of the sale to defendant. *Wing v. Milliken*, 40 Atl. Rep. 138 (Me.).

This case follows the general rule of damages in trover, that the value of the property be given at the time of the conversion by the party sued. Defendant's conversion was at the moment he bought the lumber. Where the original taking is innocent, however, the majority of the courts in this country would give only the value of the trees as standing timber. *Herdic v. Young*, 55 Pa. St. 176; *Clark v. Holdridge*, 43 N. Y. Supp. 115; *Heard v. James*, 49 Miss. 236. They apply the rule of *Wood v. Moorewood*, 3 Q. B. 440, where the plaintiff in an action for conversion of coal was allowed to recover only its value in the ground. The principal case seems to state the better rule. The owner should have the value of his property at the time the defendant deprives him of it, without regard to its previous history. It is urged in support of *Wood v. Moorewood*, *supra*, that the plaintiff there received practically full compensation, as the value of coal is not likely to increase while it remains in the ground, and that plaintiff should not receive more than he has lost. This argument, however, whatever its force in *Wood v. Moorewood*, *supra*, is not applicable to the principal case, as trees may become much more valuable if allowed to stand.

PROPERTY — EASEMENTS — COVENANTS RUNNING WITH THE LAND. — A owned two adjacent tracts of land, on one of which was a grain elevator and on the other a mill. A mill-race discharged water on a wheel connected with the mill machinery, from which power was transmitted to the elevator. A sold the elevator to the plain-

tiffs, and granted the perpetual right to use the water-power. There was also an agreement in the deed that when the water-power should be insufficient to operate both the mill and elevator, the elevator should have the preference. A afterwards sold the mill to defendants. *Held*, that the grant and agreement were binding on defendants. *Hottell v. Farmer's Protective Ass'n*, 53 Pac. Rep. 327 (Colo., Sup. Ct.).

The right to use the water-power was an easement, and the agreement that the elevator should have the preference in case of shortage in the water supply a covenant in its aid. The court does not seem to distinguish between the easement and the covenant. In England the only exception to the rule that the burden of a covenant does not run with the land is the so-called spurious easement of fencing. In *Morse v. Aldrich*, 19 Pick. 449, Massachusetts has held that where the covenant is in aid of an easement, the burden runs, and that case has been generally followed in this country. The decisions in regard to covenants concerning party walls are based on this doctrine. The present case is within the principle and seems sound. To secure a beneficial use of the easement, it is necessary to carry out the terms of the covenant. This can only be done effectually by making a covenant run with the land to which the easement attaches. It has been held that a covenant to pay rent runs with the land. *Carley v. Lewis*, 54 Ind. 23. However, as there is an adequate remedy for the recovery of rent, this is imposing an unnecessary incumbrance on the land, and seems to be an unwarranted invasion of the general rule that the burden of a covenant does not run with the land.

PROPERTY—EQUITABLE ATTACHMENT.—X, a resident of Rhode Island, had obtained a verdict in Massachusetts against Y, in an action of tort for personal injuries, but judgment had not been entered upon the verdict. *Held*, that the verdict is not property which the plaintiff, a creditor of Y, can reach by a bill in equity, for the purpose of satisfying his debt. *Bennett v. Sweet*, 51 N. E. Rep. 183 (Mass.).

The nature of the claim by X against Y was not changed by the verdict. *Stone v. Boston, etc. Ry.*, 7 Gray, 539. Therefore the real question in the case is whether the plaintiff could reach the right of action itself by a bill in equity. In the absence of statute, a right of action for a strictly personal tort does not survive to the representatives of the injured person. Mass. Pub. St., c. 165, § 1. It is not assignable, *People v. Tioga Common Pleas*, 19 Wend. 73, nor does it pass to an assignee in insolvency. *Stone v. Boston, etc. Ry.*, *supra*. A right of this kind cannot be reached by trustee process. *Thayer v. Southwick*, 8 Gray, 229. Consequently, since it is of such a personal and contingent nature as to have none of the elements of property, the decision, that it is also beyond the reach of a bill in equity, seems clearly right.

PROPERTY—ESTOPPEL—RIGHT OF WAY.—The owner of a piece of land over which there was a right of way, conveyed it to plaintiff with covenants of general warranty. Later he acquired the dominant tenement and conveyed it to defendant. *Held*, that defendant is estopped from claiming the right of way over plaintiff's land. *Hodges v. Goodspeed*, 40 Atl. Rep. 373 (R. I.).

In America, covenants in a deed are effectual to pass after-acquired title by estoppel. Rawle, *Covenants*, 5th ed., 367. This is often applied, even against a *bona fide* purchaser. *White v. Patten*, 24 Pick. 324. *Contra, Calder v. Chapman*, 52 Pa. St. 359. The extinguishment of an easement by such an estoppel seems at first a strange step, but it is one which an American court might naturally be expected to take. To apply this doctrine against a *bona fide* purchaser, however, as in the principal case, is much more contrary to the spirit of the registry laws than in the case of the passing of title to the land itself, as it is obviously even harder to make out any constructive notice from the records. See 11 HARV. LAW REV. 344.

PROPERTY—PAROL ANTENUPTIAL AGREEMENT—STATUTE OF FRAUDS.—*Held*, that a postnuptial settlement by the husband in favor of the wife in fulfilment of an oral antenuptial agreement to settle specific property in consideration of the marriage is not effectual against the husband's creditors. *Flory v. Houck*, 40 Atl. Rep. 482 (Pa.).

This case represents the prevailing doctrine in this country. Browne, *St. of Frauds*, 5th ed., § 224. There are decisions to the same effect in England. *Randall v. Morgan*, 12 Ves. 67; *Warden v. Jones*, 2 De G. & J. 76. *Warden v. Jones*, however, which was cited with approval in the principal case, has been adversely criticised in 5 Jur. N. S. (Part II) 46, and is hardly to be reconciled with *Ex parte Whitehead*, 14 Q. B. D. 419. It is generally recognized that an oral agreement for the conveyance of land is a valid contract. The Statute of Frauds simply imposes an obstacle to its enforcement. If the husband, in recognition of his moral duty, removes this obstacle by conveyance, the transaction is in no sense gratuitous and should stand against his creditors. This is the view taken when the creditors of a trustee of land, under an oral trust, attempt to

impeach as voluntary a conveyance by him to the *cestui*. The cases are analogous in principle and should be decided alike. The authorities are collected in Ames, *Cases on Trusts*, 2d ed., 181.

STATUTE OF LIMITATIONS — INJUNCTION AGAINST PLEADING STATUTE. — Plaintiff, an attorney, contracted with defendant to collect on commission certain bonds due the latter. Defendant later sold the bonds without notifying plaintiff, who did not learn of the sale until ten years afterward. Plaintiff then sued at law for breach of contract, and, on defendant setting up the Statute of Limitations, brings this bill in equity to enjoin the pleading of the statute. *Held*, that plaintiff is entitled to the relief asked. *Halloway v. Appelget*, 40 Atl. Rep. 27 (N. J., C. A.).

There is no doubt that there was equity in the plaintiff's bill. Although the majority of the cases in which a defendant has not been allowed to plead the Statute of Limitations have been those in which the act giving rise to the action was itself fraudulent, there is no reason why equity should not interfere on the same principle when the defendant by his fraud, after the right of action accrues, aims directly at obtaining an unfair advantage by reason of the statute. *Rolfe v. Gregory*, 34 L. J. Ch. N. S. 274. It is more doubtful whether the relief afforded was the right relief. By enjoining the defendant from setting up his defence, and then letting the case go from its own control, the Court of Chancery obtained no assurance that the plaintiff himself would do equity. It would seem that the plaintiff should have filed his bill for relief upon the original contract, asking the Court of Equity to take complete control over the case. The court could then, in its own discretion, have forbidden the defendant to set up the statute, and at the same time could have prevented the plaintiff from making an inequitable use of his advantage. *Aston v. Lord Exeter*, 6 Ves. Jr. a, 288; *Hylton v. Morgan*, 6 Ves. Jr. 293. It is to be noted, however, that in England, and in most jurisdictions where law and equity are administered in the same courts, the plaintiff could have gained his point by an equitable replication. *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.

TORTS — HOMICIDE — YEAR AND DAY RULE. — The plaintiff brought a statutory action to recover damages for her husband's death, which resulted from injuries caused by the defendants. *Held*, that recovery is not barred because death occurred more than a year and a day after the injuries were inflicted. *Western & Atl. R. R. Co. v. Bass*, 30 S. E. Rep. 874 (Ga.).

The case is interesting because the point has seldom been raised. The decision doubtless presents the correct view. The year and a day rule is an arbitrary rule of criminal law founded on grounds of public policy, and it should have no application in civil cases, where the only question is whether the defendant's act is the proximate cause of the death for which an action is brought. *Louisville & St. L. R. R. v. Clarke*, 152 U. S. 230; *Schlichting v. Wintgen*, 25 Hun, 626 (N. Y.).

TORTS — INVASION OF PRIVACY. — The defendant in an advertisement of his medicine published of the plaintiff with substantial truth but without authorization: "Dr. Morgan Dockrell is prescribing Sallyco; he says nothing has done his gout so much good." *Held*, that plaintiff has no cause of action. *Dockrell v. Dougall*, 78 L. T. R. 840. See NOTES.

TORTS — NEGLIGENCE — INTERVENTION OF A THIRD PARTY. — The plaintiff was injured by a trunk being thrown against him during a struggle between public porters over baggage left in an insecure position by a servant of the defendant. *Held*, that the negligence of the defendant's servant was not the direct and proximate cause of the plaintiff's injury. *Murphy v. Great Northern Railway Co.*, [1897] 2 I. R. 301.

The case is on the border line, but is correctly decided if the result could not have reasonably been foreseen by the original wrongdoer, — a point upon which the judges touch but lightly. The general rule is that the intervention of a malicious and intentional act of a third party relieves the original wrongdoer of any liability for the results of his negligence. *Alexander v. Town of New Castle*, 115 Ind. 51. The mere negligence of an intervening third party, however, does not necessarily break the causal connection between the injury and the original act, especially if, under the circumstances, the intervening negligent act ought to have been anticipated. *Lane v. Atlantic Works*, 111 Mass. 136. The present case seems to have been put on the ground that the acts of the porters were acts of "affirmative misconduct" and not of mere negligence. It is questionable whether the majority of courts in this country would follow this case when the misconduct of the third person ought to have been foreseen.

TORTS — NEGLIGENCE — LANDOWNER'S LIABILITY TO CHILDREN. — *Held*, that a railroad company is not liable for an injury by a turn-table to an infant trespasser. *Delaware, etc. R. R. v. Reich*, 40 Atl. Rep. 682 (N. J., C. A.). See NOTES.

TORTS — NEGLIGENCE — LIABILITY FOR FALSE STATEMENTS. — Defendants, directors of a bank, negligently but not fraudulently made false statements as to the condition of the bank. Plaintiff, relying on these statements, purchased stock, which proved worthless. *Held*, that defendants are liable for the damage caused by their statements. *Houston v. Thornton*, 29 S. E. Rep. 827 (N. C.).

The English House of Lords decided, in *Derry v. Peck*, 14 App. Cas. 337, that similar facts would not support an action of deceit. That case has generally been regarded as settling in England that no action will lie for negligent misstatements. *Angus v. Clifford*, [1891] 2 Ch. D. 449. There was, however, no allegation of negligence in the declaration, so that the point is really a *dictum*. Massachusetts has followed the English doctrine. *Nash v. Minn. Title and Trust Co.*, 163 Mass. 574. But in many States the question is still open. The decision in the principal case seems sound. Granting that deceit will not lie, it seems that an action for negligence should. One who makes positive statements, intending them to be acted upon, should be bound to use ordinary care to see that they are warranted, at least when the statements are made to secure a result which will operate to the personal advantage of the one making them.

TORTS — SLANDER — PRIVILEGE. — *Held*, that to justify the speaking of slanderous words on the ground of privilege it must appear, not only that the defendant believed he was speaking the truth, but that there were reasonable grounds for such belief. *Toothaker v. Conant*, 40 Atl. Rep. 331 (Me.).

The question raised has been passed upon in only a few American jurisdictions, and the majority of the decisions are in accord with the principal case. *Carpenter v. Bailey*, 53 N. H. 590; *Express Printing Co. v. Copeland*, 64 Tex. 354; *Briggs v. Garrett*, 111 Pa. St. 404. In England it is held that a defendant may avail himself of the defence of privilege if his motive is not wrongful and he has an honest belief in the truth of his statements. *Clark v. Molynaux*, 3 Q. B. D. 237. In accord with the English decisions is *Bays v. Hunt*, 60 Iowa, 251. It seems to be the better view, however, that immunity is extended sufficiently if a defendant is allowed to escape liability for defamatory statements only when they are made upon a reasonable belief in their truth. This rule checks the spreading of false reports coming from sources on which many persons would rely, but which reasonable people generally would not credit.

TRUSTS — RIGHT TO FOLLOW TRUST FUNDS. — A trustee placed trust funds in the hands of a firm which had knowledge of the trust relation. The firm used the funds in its business and, when dissolved by the death of a partner, was found to be insolvent. *Held*, that the *cestui que trust* is entitled to the amount of the converted trust funds in preference to the claims of the firm's creditors. *Evangelical Synod v. Schoeneich*, 45 S. W. Rep. 647 (Mo.).

The rule of equity which allows a *cestui que trust*, whose funds can be traced into the assets of a bankrupt estate, to take preference over the general creditors of the bankrupt, has met with much favor in the courts of this country. *Nat. Bank v. Ins. Co.*, 104 U. S. 54. A failure, however, to appreciate the principle upon which the doctrine must rest has led some courts to extend its application further than a just regard for equity would warrant. *McLeod v. Evans*, 66 Wis. 401. The present case seems to be open to this criticism. A departure from the principle that among creditors equality is equity can be justified only when necessary to prevent the general creditors from enriching themselves at the expense of a *cestui que trust*. When it does not appear that the trust funds form a part of the assets for distribution among the bankrupt's creditors, it is not a case of unjust enrichment of the creditors, and there can be no ground upon which to give the *cestui que trust* a preferred claim. This line of reasoning was used to defeat the claims of a *cestui que trust* in *Cavin v. Gleason*, 105 N. Y. 256. See also *Metropolitan Nat. Bank v. Campbell*, 77 Fed. Rep. 705. It does not appear from an examination of the facts of the present case that the plaintiff could trace the trust funds into the insolvent firm's assets, and for that reason the decision appears to be unsound.

TRUSTS — SPECIAL DEPOSIT. — A debtor deposited in a New York bank the amount due from him to a creditor in Helena, Montana. The New York bank telegraphed the Helena bank to pay the debt and charge the amount to its account. The Helena bank refused to pay the creditor except in New York exchange, which the creditor refused to accept. He also refused to allow the amount to be placed to his credit in the bank. The Helena bank failed before the creditor was paid. *Held*, that the Helena bank held the amount due the creditor as a special deposit, and he was entitled to it in preference to the general creditors. *Moreland v. Brown*, 86 Fed. Rep. 257 (C. C. A., Ninth Cir.).

The decision must be regarded as unsound. The court quotes with approval the case of *Farley v. Turner*, 26 L. J. Ch. 710, in which a misconception as to the nature

of the trust *res* led to much confusion of reasoning, although the decision was correct. A much sounder case is that of *In re Barned's Banking Co.*, 39 L. J. Ch. 635, which held that the relation created by a deposit of money with a bank for the purpose of removing an indebtedness to a third party is not one of trust, but of debtor and creditor. Business expediency requires that a bank be permitted to mingle with its own funds deposited for such purposes. There can, therefore, be no specific trust *res*, and the bank must be regarded as the debtor of the depositor.

REVIEWS.

THE LAW OF WILLS, for Students. By M. M. Bigelow. Boston: Little, Brown, & Co. 1898. pp. xxxii, 398.

In contrast with the voluminous text-books at present in vogue, it is refreshing to notice a small, compact, and well-written law-book. Such a book is Mr. Bigelow's work on the law of wills. No claim is made to any great originality; limitation of space forbids full discussion of principle. But as a summary, the book has a distinct reason for its existence, which is no small praise. If criticism were to be offered, it would be that for so compact a work the details of the minute rules for the "secondary construction" of wills are examined with a care more than likely to confuse the student, and of value chiefly to a professional. Yet it is mainly for the student that the book is written.

The substantive law is completely stated. The ground taken in regard to the construction of wills is somewhat to be regretted, the adherence to the narrow rule as set forth by Sir James Wigram (p. 161). A broader rule would have been more satisfactory. See NOTES. In view, moreover, of the full discussion of how to construe an ambiguous word by the context, the rules of construction by means of extrinsic facts are neglected,—rules which seem to be, not as the author contends, merely rules for defining the primary meaning of the words, but rules of construction for determining between the primary and the secondary meanings (p. 162). One other matter is too severely stated, the test of undue influence (p. 85). While the author admits that persuasion by wife or child may not amount to undue influence, he says that persuasion by one whose power is illegitimate, as, for instance, a mistress, is undue. This conclusion hardly seems sound. Undue influence must be coercion. Mental coercion it may be, but persuasion is not coercion at all. *Wingrove v. Wingrove*, 11 P. D. 81. Criticism, however, may give a false impression, for there are few things to be criticised adversely. The many applications of the rules of revocation are well treated, and the author's adherence to principle is commendable when he finds "grounds to doubt" whether a will can be looked upon as revoked when the testator's purpose to revoke was frustrated by the misconduct of another. In general, as a handbook of the subject, the work succeeds.

J. G. P.

THE HUDSON'S BAY COMPANY'S LAND TENURES AND THE OCCUPATION OF ASSINIBOIA BY LORD SELKIRK'S SETTLERS. With a List of Grantees under the Earl and the Company. By Archer Martin. London: William Clowes & Sons, Limited. 1898. pp. ix, 238.

In 1634 a vast tract of American territory was granted the "Governor and Company of the Hudson Bay Adventurers." The Company, in

1811, sold a large part of what is now Assiniboia and Manitoba to the Earl of Selkirk. He undertook to colonize it, but the attempt was not a financial success, and in 1834 the property was returned to the Hudson Bay Company. Thirty-five years later all the possessions of this Company were resold to the Crown. In the course of these changes of ownership, many grants were made to settlers; and as a whole, they were carelessly recorded. From this fact, and from the fact that among the settlers there were frequent transfers of possession by verbal sale, or by abandonment, great confusion of title resulted; and the unravelling of this tangle has caused endless trouble to the Canadian courts.

In this book the author has endeavored, in a measure, to clear up these difficulties by a full compilation of original grants, and by a careful investigation of the subsequent history of the lands comprised. An example will bring out the importance of this work. For many years it was believed, and the courts acted on the belief, that the grants by Lord Selkirk were all leaseholds. Mr. Martin has proved beyond question that the great majority were grants in fee simple. It thus appears that thousands of acres have been handed over to executors which of right should have gone to the heirs.

There have been many difficulties in the way of accurate work. First, the Statute of Frauds, passed after the original grant to the Hudson's Bay Company, has never been in force as touching their possessions. The mere verbal agreements, therefore, of the early settlers passed good titles. Again, of those title documents which did exist, a large part were destroyed by fire, more by the unlawful act of a revengeful Governor, and still others by the half-breeds in the Red River rebellion. In spite of all this the author has brought together very full tables of grants. He has discovered also much that is of interest and importance regarding the land tenures under the different proprietors. His task has been laborious, but his contribution to the land law of Canada is correspondingly valuable.

G. B. H.

THE LIFE OF DAVID DUDLEY FIELD. By Henry M. Field. New York: Charles Scribner's Sons. 1898. pp. 361.

From the above title we are led to expect a careful, serious biography. Instead, Mr. Field has given a volume of personal recollections of his brother. He has made no attempt to describe and analyze David Field's great work in the formation of the New York Codes, no attempt even to give a complete record of the happenings of his life, passing over, for example, the unpleasant episodes which grew out of his relations with Fisk.

The value of the book lies in the statement of certain facts which lay peculiarly in the author's memory. Probably no one else could tell so well of Field's immense capacity for work, of his enthusiasm for the cause of reform in the law, of his part in the nomination of Lincoln, and of his devotion to the cause of a generous reconstruction of the South.

Taken as a whole, the book is not well written. The author is diffuse, over-fluent, too willing to please with gossipy anecdote, too willing to indulge in independent philosophical reflections or in irrelevant historical comment. In such a setting it is most pleasant to come upon the quotations from Field's own speeches, particularly from his speech before the Peace Conference of 1861.

J. P. C., JR.

MALICE AS AN INGREDIENT OF A CIVIL CAUSE OF ACTION. By L. C. Krauthoff. 1898. pp. 56.

This paper, read by the author at the last annual meeting of the American Bar Association, is another comment upon the case of *Allen v. Flood*, [1898] App. Cas. 1. The author takes the middle ground in the discussion, adopting what he conceives to be the view of the House of Lords, that malice in actions for interference with business is immaterial, but that there is a certain "right to business" recognized by law which may be violated by an act which is in itself unlawful. The writer does not seem to be troubled by the fact that this right must be a rather peculiar one when nothing can violate it except an act which violates some other right, and depends upon that other violation for its illegality. But perhaps the state of American decisions does not permit us to question the existence of that right.

In dealing with the question of malice, Mr. Krauthoff agrees with the majority of the House of Lords, and concludes that most American cases agree with him. Without disputing his general conclusions at all, we cannot but feel that he does scant justice to the opposition, both in matter of reasoning and in regard to weight of authority. In Massachusetts and New Jersey there is certainly a strong tendency against the English rule. *Walker v. Cronin*, 107 Mass. 555; *Van Horn v. Van Horn*, 52 N. J. L. 284. The addition, if any, which the writer really makes to the theoretical discussion of the subject is his suggestion that the element of conspiracy can make no difference in the law, but that unlawful intimidation is more likely to be present where there is conspiracy; an act which might have no effect if done by one person may well intimidate if done by a hundred persons conjointly. J. G. P.

THE WAR REVENUE LAW OF 1898. Annotated by Edward L. Heydecker and Fulton McMahon. Albany, N. Y.: Matthew Bender. 1898. pp. vii, 167.

THE WAR REVENUE LAW OF 1898 EXPLAINED. By John M. Gould and Edward H. Savary. Boston: Little, Brown, & Company. 1898. pp. x, 190.

These books are identical in object, and differ little in plan of execution. Both print the Revenue Act in full and follow each section with notes. These notes point out what former acts are the basis of the sections in question, then give decisions rendered on the interpretation of similar provisions both in the United States and England, and lastly, suggest what seems to be the more probable meaning of certain doubtful passages. The first-mentioned volume is considerably the fuller in its historical treatment of the sections, and gives more reference to English decisions. The other, written two months later than the first, has the advantage of being able to quote many rulings by the commissioner regarding this very law. It also has an appendix containing explanatory circulars issued by the Department of the Interior, and also forms for the papers which may be required under the act. A chapter of "Practical Suggestions" based on the actual workings of the law is added.

Although the two books of necessity have much in common, they have been thought out on separate lines, and in each one there is much material which is not to be found in the other. For instance, each cites approxi-

mately three hundred and fifty cases bearing on the interpretation of the law; but of these only about one hundred and fifty appear in both volumes.

G. B. H.

THE PRINCIPLES OF THE LAW OF SEDITION. By J. Chaudhuri. Calcutta: Weekly Notes Printing Works. 1898. pp. vii, 48, liv.

This controversial pamphlet was directed against the then impending change in section 1244 of the Indian Criminal Code defining the offence of sedition. The thesis of the volume is that the common-law offences, which may be conveniently described as seditious, require both an overt act calculated to produce the unlawful use of force and a specific intent to subvert or overthrow the government. *Reg. v. Burns*, 16 Cox C. C. 366. The author is clearly right in his contention that the then proposed change from this requirement of an actual specific intent to a mere general intent inferred from the natural consequences of the act was a distinct departure from common law. However, the author is in error in assuming, as he does throughout, that to establish this thesis is a conclusive argument against the proposed change. He does not seem to consider the question of policy. Yet it was doubtless the special dangers in India from the vernacular press and from native agitators, secular and religious, that determined the enactment of a severer law of sedition.

B. W.

INTRODUCTION TO THE STUDY OF LAW. By Edwin H. Woodruff. New York: Baker, Voorhis, & Co. 1898. pp. 84.

The first few weeks of legal study often prove discouraging. This book is designed for a temporary aid during this period. It is a collection of such information as the author has felt "would be of particular assistance to students just entering upon the study of law." It explains in simple language those fundamental principles and truths which the student meets from the first. The relation of law to morality, the difference between authority and *dictum*, the desirability of following precedent, etc.—all these matters are considered. The writer outlines the difference between law and equity, and gives a brief historical summary of their development. The different kinds of law books, their uses, and abbreviations, are touched upon. The relations of the different courts to each other are mentioned. The author has succeeded in putting what he has to say into an attractive and concise form, and while the book is hardly one for careful study, it will repay reading.

G. B. H.

BOOKS RECEIVED.

CASES ON AMERICAN CONSTITUTIONAL LAW. Edited by Carl Evans Boyd. Chicago: Callaghan & Co. 1898.

CODE MUNICIPAL DE LA PROVINCE DE QUEBEC. Annoté. Par J. E. Bedard. Montreal: C. Theoret. 1898.

GENERAL DIGEST. Quarterly advance Sheets. Rochester, N. Y.: The Lawyer's Coöperative Publishing Co. July, 1898.

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QUEBEC LAW INDEX. By Harris H. Bligh. Montreal: C. Theoret. 1898.

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THE FEE SYSTEM IN THE UNITED STATES. By Thomas K. Urdhal. Madison, Wis.: Democrat Printing Co. 1898.

THE HUDSON BAY COMPANY'S LAND TENURES. By Archer Martin. London: William Clowes & Sons, Limited. 1898.

THE LAW OF BANKRUPTCY. By Wm. Miller Collier. Albany, N. Y.: Matthew Bender. 1898.

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THE TRAGEDY OF A WIDOW'S THIRD. By Anna Christy Fall. Boston: Irving P. Fox. 1898.

THE WAR REVENUE LAW OF 1898. Annotated. By Edward L. Heydecker and Fulton McMahon. Albany, N. Y.: Matthew Bender. 1898.

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THE KING'S JUSTICE IN THE EARLY MIDDLE AGES.

WILLIAM THE CONQUEROR, it is now common knowledge, no more intended, in a general way, to disturb the laws and customs of Englishmen than the East India Company to disturb those of the Hindus in Bengal. As for the law of the Church, which at that time every one both spoke and thought of as the law of God, it was binding on conquerors and conquered alike, not as Norman or English, but as Christian men; and not only William, who had prevailed partly in the strength of the Church, could not well have any will to meddle with the things of her jurisdiction, but he could never have supposed himself to have any such power. Admitting the Church to be supreme in her own sphere was not, indeed, the same thing as allowing her particular minister in the See of Canterbury, or even the servant of the servants of God who sat in St. Peter's chair at Rome, to be the sole judge of how far that sphere extended; nor did it exclude the King from claiming at least an influential voice in the disposal of ecclesiastical high places which carried with them a great deal of temporal emoluments and authority. Plenty of troublesome questions were to arise in these and such like matters in time, but not yet. The Conqueror made one sweeping innovation in the relations of Church and State. He gave the bishops the freedom of their own courts, and removed them from dealing with spiritual matters in the hundred and county courts, in the interest of the canon law

and the canonical discipline of souls.¹ He did not forbid bishops or other ecclesiastics to take part in secular justice, and they continued to do so long afterwards.²

Perhaps we may doubt whether the apparent and immediate gain of the Church in setting up a judicial system of her own over laymen as well as clerks, which ultimately came into competition and collision with the King's courts, was not in the long run more than outweighed by its drawbacks for both priests and people. But there could be no suspicion of this at the time.

In other respects William showed himself even anxious to confirm existing rights and customs. His ordinances, so far as known to us in substance,³ are chiefly directed to that end; he must have allegiance and obedience, and his Norman followers must be protected from the revenge of lurking rebels; they are to be in the King's own peace. But they are to respect English laws and procedure too; the Norman trial by battle is open to an Englishman to choose if he likes, but he must in no case have it forced on him. The old rules about buying cattle before good witnesses are reasserted and strengthened; selling men into slavery abroad is again emphatically and this time, we hope, more efficiently forbidden.⁴ A short-lived attempt was made to abolish capital punishment by a sort of rude compromise with humanity, substituting mutilations which now seem to us more repulsive than death. Ranjit Singh's penal justice was of the same kind when he ruled the Panjáb in the first half of the nineteenth century.⁵ This, like many other passing experiments in the repression of crime, has no bearing on the general history or development of the law. But it was not a wholly strange thing in England, for a similar tendency appears in Cnut's laws.

There was nothing really new, again, in William's flat refusal to do fealty to the Pope, which he expressly put on the ground that he neither had promised it nor could hear of any of his predecessors having done it.⁶ Such a demand had not been refused

¹ See the text of his ordinance separating the spiritual and temporal courts, Stubbs, *Sel. Ch.* 85.

² In France, on the other hand, there were some curious survivals of popular procedure even in ecclesiastical causes down to the end of the twelfth century. Viollet, *Hist. des Institutions politiques et administratives de la France*, ii. 455.

³ Stubbs, *Sel. Ch.* 83.

⁴ Slave trading died hard. It was not extinct in 1102, for the Synod of Westminster had to condemn it then. See Freeman, *N. C. V.* 223.

⁵ Stephen, *Hist. Cr. L.* i. 252.

⁶ Stubbs, *Const. Hist.* i. 285.

before, because it had never been made. And if the contemporary use in England of such terms as "*mandata imperialia*" shows that William would equally have repudiated any claim of superiority on the Emperor's part, we may also read "*basileus*," which imports the same claim of perfect sovereignty, in Anglo-Saxon charters. The tradition was broken only once in the whole course of English history, and then by John, the worst of all English kings.¹

Yet it was inevitable that the King's activity and authority should increase. William's ancestor Rollo had come to a country living under a Frankish law which, rude as it might be, was more advanced than the customs of the Northmen; and the Normans took up the speech and the laws of their new country. William and his Normans, on the other hand, came into England, a land of less advanced law, bringing a law of the same general type, but farther advanced and more defined. Whether William supposed himself to be only exercising the same rights that English kings had exercised, or assumed that as King in England he could at least have no less powers than he had as Duke in Normandy, or, as perhaps is most likely, had no theory of his powers at all, the practical result could only be to raise the English official system and English procedure to the Norman standard.

Here then was the beginning of a new system of jurisdiction. It grew and prevailed in a manner thoroughly typical of English reforms, not by any exclusive establishment, but by superior merit. The King had to do justice for some particular purposes. His justice was much stronger than any other; if costly, it was well worth the cost; and its extension was as welcome to suitors as unwelcome to those who made their profit of small folk's weakness or timidity. Not that the King's justice was offered to the people at large in the first instance; it was eagerly sought after as a privilege. Even when it became general, there was no word of abolishing the old popular courts and their procedure. They were merely superseded by the greater convenience of the royal courts, or of private lords' courts which imitated the royal methods as closely as they could; at last, and very gradually, they perished by disuse, leaving but a few traces to be swept away by systematic modern legislation. It was a century after the Conquest when the King's law was recognized in terms as the law of the land, and yet a

¹ Stephen went near it. Freeman, N. C. V. 247.

century more was to pass before it stood out as the supreme institution of English government.

Feudalism, whatever we may think of its other effects, was the first moving cause of this inestimable blessing. The King was not only ruler in peace and commander in war, but the greatest of over-lords; and the principle that a lord owed justice to the men who held their lands of him was already well established on the Continent. In the thirteenth century lawyers had become subtle enough to distinguish the King's public jurisdiction over his subjects from his private jurisdiction as lord over the smaller folk on his estates; manors of "ancient demesne" were recognized as being under a peculiar law, which, though royal, was of a private nature. But this refinement had not yet been worked out in the Conqueror's age. Then the King's lordship was vastly increased by the wholesale confiscation which followed the Conquest. It seemed only right and natural, even without the aid of any technical doctrine of forfeiture, that the King should take the lands of those who stood out against him. Much of the old book-land which had been free from any tie of over-lordship, though answerable for the greater public burdens, thus fell into the King's hand. When it was given out again to the King's followers, it was given on terms of feudal tenure; not so much on any deliberate ground of policy, as because a King of the English who had been and still was Duke of Normandy could hardly think of giving it in any other way. The practical result was great and speedy. For whoever held immediately of the King was entitled to look to the King for justice. The churches which held estates — one should rather say districts in some cases — under royal land-books of various dates continued to hold them without any substantial change. But the idea of tenure was in fashion, and it was easy to construct a bond of lordship and service out of the undefined expectations of spiritual benefits which the pious founders or donors had embodied in their verbose preambles. As the man of war must fight for his lord, so the man of religion must pray for him and for the souls of his ancestors, though neither the amount nor the value of his service could be measured by any temporal standard. So the saints themselves (for men still personified a church or foundation by the name of its patron saint) became, in such sort as they might, the King's men; and "frank almoin," *libera eleemosyna*, appears in our classical law-books as a regular species of tenure, though all the ordinary incidents of tenure, including the oath of

fealty, are wanting. Feudalism carried its point so far that bishops did homage to the Crown for the temporal possessions of their sees after election and before consecration; and they do so to this day.¹

Here is at once a wide field of jurisdiction for the King, so much widened as to be practically new. A boundary dispute arises between a great monastery and the Norman earl who is the abbot's next neighbor; or to take real cases, the abbot of Battle, the King's own foundation, claims to be exempt from all jurisdiction and interference of the Bishop of Chichester; the monks of Gloucester claim in the name of God and St. Peter to have their rights in lands out of which they are kept by the Archbishop of York; the men of Wallingford, being jealous (as great powers may nowadays be in affairs of trade on a larger scale), disturb the privileged fair held by the monks of Abingdon; the abbot of Peterborough makes difficulties about letting the abbot of St. Edmund's have stone for repairs.² Who shall decide? The hundred court is not fitted to deal with such matters; a county court, or a great court of three or more counties, would be dignified enough, and in a matter of ancient customs the King may still have such a court summoned to enlighten him; but the proper and the best judge, whose judgment will really be conclusive and cannot be slighted with impunity, is the King himself, the common lord of the parties. Besides which, the King can tell best what he intended to grant, for we are not to think yet of the jealous caution of the latter days in which the judicial right hand may not know what the executive left hand doeth. And this eminence of knowledge will, as the course of time requires, be extended to the grants of the King's pious ancestors.

Thus we find the King, before his court can be called an organized tribunal, already dispensing a justice which, if not of common right, is not merely of favor. He is not yet bound by forms; he may hold a meeting of his counsellors, or he may order the proper county court to investigate complaints of encroachment by his own officers on the immunities of a religious house.³ On

¹ Anselm's homage to William Rufus, in 1093, is mentioned as a thing already settled by precedent: "*More et exemplo praedecessoris sui inductus pro usa terrae homo regis factus est.*" Eadmer, page 41 of *Rolls* ed. The words "I become your man" were omitted in the form used later; it is not certain that Anselm used them.

² Bigelow, *Plac. Anglo-Normannica*, 14, 29, 32.

³ *Ib.*, 30-31.

the other hand he may sometimes, on being satisfied of the facts, issue a direct mandate which is both judicial and executive. One way or another, he hears and determines what may be called privileged causes, and his experimental or occasional methods are the starting-point of the procedure which his successors will elaborate. We must not look for a settled plan in the Conqueror's judicial or semi-judicial orders. At one point they may seem to the modern lawyer to resemble a judgment on appeal, at others an order for a trial before special commissioners, or for a new trial on cause shown, at another an injunction obtained at short notice; but the resemblances to anything in latter-day practice are too fitful and precarious to help us much. Gradually, however, what was at first occasional became frequent in matters of recurring need, and what was proved to be of practical utility became customary. The custom of the King's court hardened into rule, and within a century there was a distinct beginning of the system of writs and forms of action which was to fix the lines of the common law.

The great commission of inquiry which recorded the taxable values of England twenty years after the Conquest, and whose report is preserved in Domesday Book, had no direct concern with any law but what we should now call revenue law, and only gives us occasional light by its incidental notices of disputed claims. Its problems really belong to the Anglo-Saxon period much more than to the Anglo-Norman, and to the student of economic history at least as much as to the lawyer. But the form of the Domesday inquest has an importance for the historian of law quite apart from its matter. We mark here the first appearance on English ground of a new means of getting authentic information. A report is made on oath by men of the place concerned, city, borough, or township, who are in a position to know the facts; it consists of answers returned to questions or articles of inquiry so drawn up by skilled persons as to make it plain what information is wanted; it follows the lines of the inquiry, and is recorded on a methodical plan; but there is nothing absolutely formal about it, and nothing to prevent explanatory matter from being added. Also "the machinery that furnishes the jurors," the existing taxable arrangement of hundreds and townships, "is native."¹ Thus the example was easy to be followed and likely to spread. The royal procedure

¹ Stubbs, *Const. Hist.* i. 275.

was imitated, in the course of the next century, by other great lords of lands. The princely bishop of Durham and the abbot of Peterborough in the northern parts, the dean and chapter of St. Paul's in the region north and east of London, the abbot of Glastonbury in the south, caused the state of their domains to be recorded on a system generally similar to that of Domesday Book. By the time of Henry II. the sworn inquest must have been a pretty familiar institution of estate management all over England, or, we may almost say, of local government, for the two things, outside the towns, are hardly distinguishable in the English polity of the twelfth century. Thus the way was cleared for the great reforms in legal procedure which began under Henry II. It was kept clear also, from another direction, by the English reaction, still obscure to us in many of its details, which took place after the accession of Henry II.'s grandfather, first of the name.

In William Rufus's time there had been no justice to be found at the king's hand and not much law, though it was not a period of anarchy such as had yet to be endured under the nominal rule of Stephen. The desire of a people oppressed and taxed by strangers was for restoration of their ancient customs. And that restoration was promised them by Henry I., no doubt in all good faith, when at the end of the eleventh century he came to the throne, and in the plainest terms admitted the grievance and repudiated his brother's course of exactions.¹ The customs of Edward the Confessor's day, with William I.'s not very large amendments, were declared valid. "*Lagam regis Eadwardi vobis reddo cum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum.*" Such were the King's words; he purposely spoke of *laga*, the Anglo-Danish customs, not of some *lex* which might have been a new foreign thing. His marriage with a wife who brought the ancient royal blood of Wessex into the succession was a further earnest of national revival. The movement was deep and genuine, as we know by the best of evidence, the jealousy of the Norman courtiers who scoffed at the English goodman and goodwife. On the legal side, it took shape in industrious and more or less honest endeavors to reconstruct the customs of Edward the Confessor from Anglo-Saxon documents, and interpret them for the benefit both of clerks and officials who knew little English of any kind,

¹ "*Quia regnum oppressum erat iniustis exactionibus.*" Coronation Charter of Henry I., sec. 1; Stubbs, *Sel. Ch.* 100. A critical text was published by Dr. Liebermann in 1894. *Trans. R. Hist. Soc. N. S.* viii. 21, 40.

and Englishmen for whom the language of Alfred's time, if not of the Confessor's, was ceasing to be intelligible. These works were partly mere compilation of earlier documents executed with tolerable faithfulness, though not always with adequate knowledge; partly attempts at restating the old customary laws, with improvements of detail and explanation, in the form of a continuous text-book; and, in one well-known case, a mixture of half-understood fact with impudent fiction, which brings in, amongst other strange matter, a legend of King Arthur of Britain having conquered and converted Norway and the Baltic lands as far as Russia.¹ This ingenious way of disguising the Danish conquest of England seems to have been too bold even for twelfth-century readers; Malory's picture, three centuries and a half later, of Arthur receiving the keys of Rome from the "Potestate" is more plausible.

These books, however, or portions of them, certainly supplied a want and had a considerable vogue. If they had been mere exercises of students, they would not have been preserved as they have been. For a time some of them were probably used as books of practice, though the actual usage of the court must always have prevailed. From this quarter we hear nothing of the King's new jurisdiction. The writers were concerned only with the old custom, and they apparently believed, or hoped some one would believe, that there were still different bodies of provincial custom not only for the Danelaw and for the rest of England, but for Mercia and Wessex.² Antiquarianism is mixed with little bits of rationalizing and occasional attempts to show off foreign learning in a way that makes it very difficult to know how much is to be taken seriously. But in any case we have to do here with a real wave of national feeling, curiously enough almost coinciding with that first general revival of letters after the Dark Ages which has been called the lesser Renaissance. It was strictly national as not being confined to any class; it was active in the mind and in the words of many who hardly knew the English tongue. From this impulse men took

¹ Such are in brief the characters of (a) the "*Quadripartitus*," only of late known to us in its proper form, and to some extent the "*Leges Willelmi*;" (b) the "*Leges Henrici Primi*;" (c) the "*Leges Edwardi Confessoris*," which pretend to be an authentic return of the old customs made under William I. See P. & M. i. 76-82. Roughly speaking, the veracity of a book of this kind varies inversely as the authority of the writer claims for it. None of the writers seem to have been of English speech or race.

² We know that the local courts had their own different usages; but nothing is said of larger provincial customs in any authentic source of information after the Conquest.

heart and strength, we may well believe, to set themselves in the future against all attempts to introduce foreign methods of justice. English law had to develop itself with native resources, and was driven to be inventive. It might borrow on occasion, — some leading men were prepared to borrow more than posterity approved of, — but it was not to be displaced. The King's justice, with all its innovations in form, was really the strongest guardian of the national law; for the central power of the King's court moulded the law to uniformity. What might have become a number of feeble provincial customs became the one and indisputable law of the land. The foundation laid by Henry I. was submerged in the horrible anarchy of Stephen's time but not removed. Henry II. was able to take up the work where his grandfather had left it, perhaps all the more efficiently by reason of the crying need for a king who could and would govern.

Whatever faults Henry II. may be chargeable with, incompetence or indolence in the duties of his office cannot be reckoned among them. He was not only an active ruler and a master of administration, but a statesman, a scholar, and a lawyer; and he had the gift, by no means always found in conjunction with personal ability, of attracting the best men to his service. The moulding of royal justice into settled forms which took place during the reign was due, to a large extent, to Henry's own invention. He had a free hand for experiment and improvement; forms were still elastic, and the formal division of labor in high offices was not yet fixed, so that creation of new functions and redistribution of old ones met with no great difficulty. So far indeed was the official system from being complete, that, if we may judge by the gaps in our extant materials, it was not uncommon for the King to make rules, or even what we should now call enactments, of first-rate importance, of which it was nobody's business — or, what amounts to the same thing, not known to be any certain person's business — to keep a permanent record. But, on the whole, we find the benefits of methodical procedure in the hands of skilled officers increasing and appreciated; they are more than once or twice extolled by contemporary writers.

The King's court or council — so far we may call it either — was in the Anglo-Norman period essentially what it had been before the Conquest; namely, the King himself, and as many of the great men, bishops, and abbots as happened to be on the spot. Henry II. did not altogether abandon the custom of doing

judicial business in such assemblies, in which he not merely presided but took an active part.¹ At times he seems, like the Conqueror, to have given executive orders on the strength of his own information without any regular judicial hearing. On one occasion early in his reign² he directed his chief justiciar, the Earl of Leicester, to hold an inquest of Berkshire, and ascertain by the verdict of twenty-four ancient men what were the rights of holding a market enjoyed by the abbot of Abingdon in the time of Henry I., the men of Wallingford and Oxford having disputed the abbot's claim. A court was held at Farnborough, and the jurors declared in the abbot's favor, but some of them were objected to for being his servants or tenants. The King ordered another court to be held at Oxford, each side to choose its own jurors. The jurors of Oxford, of Wallingford, and of Berkshire generally made separate and, as perhaps might have been expected, discordant returns. The Earl gave no judgment, but reported to the King his own knowledge that he had lived at Abingdon as a boy and seen a full market there not only in Henry I.'s time but earlier. The King, "pleased to have so eminent a witness," acted on this without hesitation, and sent the Wallingford and Oxford people about their business in a summary manner when they came to him at Reading. Again, the court which declared Archbishop Becket in contempt in 1164 was a miscellaneous court of the King's barons.³ A distinction which occurs quite naturally to the modern reader, namely, that this controversy was rather political than legal, would at the time have seemed equally irrelevant, and have been about equally unacceptable, to both parties.

It must not be assumed that the King's personal attention to causes brought before him was an unmixed benefit. When obtained, it was effectual; but the need for obtaining it, and for that purpose following the King's constant movements not only in England but beyond England, could in the earlier part of Henry II.'s reign be a cause of grave delays. Richard de Anesti's well-known account of his adventures in recovering his uncle's land⁴ shows about five years consumed in what might indeed be

¹ See the case of *Battle Abbey v. Gilbert de Baillol*, Bigelow, Plac. A.-N. 175; and the renewal of the same Abbey's charters, *ib.* 221, where the King made a point of proceeding judicially.

² *Op. cit.* 201.

³ *Ib.* 214.

⁴ Palgrave, *English Commonwealth*, ii. pages ix, lxxv; abridged in A.-N. 311; Hall *Court Life under the Plantagenets*, 98, 250.

called suing and laboring. We must remember, however, that this was an exceptional case, as it turned on a question of marriage, a matter of ecclesiastical jurisdiction, and thus involved references backwards and forwards between temporal and spiritual authorities, including two expeditions to Rome; not to mention that it was contested with large means and probably no excess of scruple on either side. Also measures of time and speed are relative, and people had not learnt to be in a hurry in the twelfth century. Cost is much more the burden of Anesti's tale than delay.¹

But though he kept indefinite powers of amendment in his own hands, and never treated himself as actually bound by his own rules, Henry II. did lay down the lines on which future development was to proceed, and left them so settled that, while much was added in the thirteenth century, we can hardly say that anything material was taken away. The King's general right of sending out commissioners authorized to inquire and report, or to act in the King's name, or both, was used in the systematic appointment of travelling or "itinerant" judges, justices "in eire" as official Anglo-French called them. The ordinance known as the Assize of Northampton defined their functions in 1176; they were to see to the enforcement of criminal law and the Crown's dues of all sorts, to require a general oath of fealty (no mere formal matter after a dangerous rebellion), and to administer the remedy newly devised by the King's wisdom, of which we shall have to speak further on, for quieting men in their possessions. Eighteen judges were assigned, three to each of six circuits; but the King's seal for justice went too fast for his people, and the number was complained of as oppressive; nor is this surprising when we remember that the justices travelled with a considerable retinue, and at the expense of the places they visited. In 1178 a permanent body of five, two clerks and three laymen, chosen from the King's immediate following, was appointed to remain at the King's court and hear suits, reserving only cases of special difficulty for the King himself in Council.² This probably was meant to lighten, and did lighten, the work of the justices in eire; that work was far too necessary to be dispensed with, and, under changes of

¹ He had to borrow money to carry on his suit at rates varying from about 80 to about 60 per cent per annum (4*d.* or 3*d.* per week for £1), sometimes only about 40 per cent (2*d.* per week for £1).

² Sel. Ch. 130, 131.

form and title, has continued without interruption down to our own day. We have here then the two capital elements of royal justice, — a tribunal of learned persons attached to the King's court (though not yet fixed to any certain place, but dependent on the King's movements), and judicial commissioners armed with the King's plenary authority, representing his dignity as inseparably associated with the dignity of the law, who render justice in his name in every part of the kingdom. We have even a beginning of the jurisdiction of the House of Lords — properly the King in Parliament — as a court of last resort.

At the same time the King was enlarging his judicial powers by the institution of new remedies in civil affairs. One of the great problems of medieval justice was to prevent men from taking the law, or what they supposed to be law, into their own hands. It must have seemed in many parts of England at many times a less risky thing to settle a question of title or boundaries in one's own favor and by one's own strength than to invoke the tardy and cumbrous aid of the hundred or the county. Thus the prohibition of self-help is among the first cares of princes who mean to leave the name of having kept good peace; and endeavors in this direction may be observed even before the Conquest. But a power that can effectually forbid men to redress themselves by the strong hand can no less effectually forbid the provocation, and furnish lawful aid for those who are disturbed in their peaceful enjoyment; and in order to justify its reforms it is bound to do so. The King must put forth his strength for right if private violence is to be without excuse. For such reasons Henry II. and his counsellors, not without long thought and watching,¹ devised a speedy remedy for the protection and quieting of possession, to be administered by the King's judges over the heads of both popular courts and intermediate lords. Introduced as it was by an "assize" or special ordinance, perhaps made at the same council as the Assize of Clarendon in 1166,² this remedy for unjust dispossession (and all dispossession save by regular judgment was counted unjust)³ became known as the "assize of novel disseisin."

¹ "De beneficio principis succurritur ei (disseisito) per assisam novae disseisinae multis vigiliis excogitatam et inventam." Bract. 164 b. The Grand Assize had already been described as "regale quoddam beneficium clementia principis de consilio procerum populis indultum" in the well-known passage of Glanvill, ii. 7, Sel. Ch. 161.

² P. & M. i. 124.

³ *Op. cit.* ii. 51. In 1192 Abbot Samson's monks at St. Edmund's wanted him to turn out some townsmen who had encroached on abbey land in the town; he told

It was the eldest brother of a family of actions, and the procedure by assize in every form has a double importance. The justice it offers to the people is emphatically the King's justice; and, moreover, it operates by the modern and royal method of inquest on oath. There is not a doom given by the suitors of the court, but a judgment of the King's judges on the return made to their inquiry by lawful men who vouch for the facts. In considering this kind of action as familiarizing and extending the new mode of trial on the merits as against the formal procedure of the ancient courts, we must remember that "it soon became an exceedingly popular action."¹ It made a great advance in both speed and efficacy on any remedy then existing; it might have continued popular, and escaped the fate of becoming in its turn antiquated and cumbrous in the eyes of later generations,² if its benefits had not been confined to freeholders.

More than this, for interfering with old forms was in the twelfth century a bolder stroke than making new ones, Henry II. applied the new procedure to the action for determining title to land as distinct from immediate possession, "the great and final remedy of a writ of right."³ We know so little of dealings with land other than book-land in Anglo-Saxon courts that it is impossible to say what more archaic forms, if any, the writ of right supplanted; but such as Henry II. found it, the process was Anglo-Norman, assumed feudal relations of tenure, and led — after many possible delays — to a decision by the regular Anglo-Norman method of proof, namely, battle. But now the King intervened, taking thought, as a prince tender of his subjects' welfare, for men's lives and the safety of their estates.⁴ The tenant in possession challenged by a claimant might "avoid the doubtful chance of battle" by "putting himself on the King's Great Assize;" that ordinance enabled him

them he dared not act without the judgment of a court; disseising free men who were in actual possession, right or wrong, meant being in trouble with the King for breaking the assize (*quod si faceret, dicebat se cadere in misericordiam regis per assisam regni*). *Joc. de Brakel*, page 57.

¹ P. & M. ii. 47.

² There is no difficulty in finding a parallel. In discussing the somewhat analogous remedy called *possessorium summarium* or even *summariissimum* in modern Roman law, Savigny reported of his own knowledge an instance where the *summariissimum* had lasted twelve years without any prospect of an end. *Recht des Besizes*, 7th ed. 1865, page 534.

³ Blackst. iii. 191.

⁴ *Glanv.* ii. 7. The exact date is unknown, nor is the text of the assize itself preserved.

at his option to claim a decision by an inquest of knights. Four knights were first named by the sheriff, and proceeded to choose other twelve,¹ and the twelve had to declare on oath which party had the greater right in the land (or other subject-matter assimilated to land) held by the one and claimed by the other. By this innovation the King and his learned advisers really committed themselves to two positions: first, that it should be possible to settle men's disputes by some rational way of ascertaining the truth; secondly, that trial by battle, though it purported to be an appeal to the judgment of God, was not a rational way. The King who takes this on himself is no longer a mere supervisor or executive chief; he is the guardian and director of justice in his kingdom.

Not that trial by battle forthwith went out of fashion. Only the defendant² could claim the trial by assize. He would naturally do so if he felt confident in the justice of his case. But if he had a bad case, or one which he thought likely to seem bad for any reason, it was his interest to let things proceed in the old course, and make the best compromise he could at the last moment before the judicial combat; and this appears to have been done from time to time almost as long as the writ of right was in practical use.³ Determination of the issue by battle actually fought out, though not uncommon throughout the thirteenth century in cases of criminal "appeals," was the exception, it is believed a rare exception, in the writ of right.

Here as elsewhere the rule holds that the King's justice in men's private affairs is at first a matter of grace, except where on

¹ This indirect election of the jurors appears designed to prevent collusion between either party and the sheriff. In later practice the four knights chose themselves and a number of others, making up in the whole sixteen (Y. B. 30 & 31 Ed. I. 116) or twenty-four, of whom sixteen acted (Blackst. iii. Appx. 1, § 6); but Glanvill's text looks as if the first four were originally not allowed to elect any of themselves; and the practice was still the same in Henry III.'s reign, Bract. 331 b.

² Properly "tenant," but the technical distinction of terms is not worth preserving unless one is studying the forms of pleading in detail.

³ In some recorded cases of this kind the proceedings may have been collusive from the first, and the combat only a more dramatic forerunner of the pleadings in the "common recovery" of the developed real property law. P. & M. ii. 96. See a very full fourteenth-century example of a trial by battle compromised when the champions were in the field, Dugd. Orig. 68. The duel of chivalry under the Earl Marshal's jurisdiction, mostly in cases of "transmarine treason," was different in origin and character and outside the common law. As to this see Selden, *Duello*, c. 11, extracted in Dugd. 76 sqq.; Neilson, *Trial by Combat*, 160-207.

feudal principles he is bound as lord to do justice—not royal but seigniorial justice, strictly speaking—to his men who hold lands of him and owe him service. The benefit of the King's ordinance must be expressly sought by those who want it; if not, the old customary law takes its course.

There was another function of the King's court which became prominent in the latter half of the twelfth century; that of recording solemn compromises between parties. As early as the time of Henry I. we find the King arranging terms between eminent persons by his own authority or influence, and setting the terms down in a writ.¹ Under Henry II. it became common for parties who had made their own terms to come before the King's judges to have them recorded. Such a record had all the value of a judgment in both certainty and efficacy; so that it was worth while for purchasers of lands to simulate a dispute with their vendors for the purpose of having their "final concord" registered in authentic terms by the King's judges. Hence arose the form of "common assurance" which flourished for the best part of seven centuries under the name of a Fine. The details belong rather to the special history of the law of real property; but there is no doubt that the services of the King's court to landowners in this respect, anticipating, as best might then be done, the modern devices of registration, were among its chief claims to the esteem and—what was perhaps more to the King's purpose—the resort and fees of suitors.

Also the King's court appears from Henry II.'s time, if not earlier, as guarding the subject's personal liberty—not merely freedom from wrongful imprisonment, but the condition of a free man. A strayed villein may be claimed by his lord in the county court; but if the man raises the defence or preliminary exception that he is a freeman and no villein by blood, and gives due security to the sheriff for prosecuting this claim, the proceedings must be removed into the King's court, and become in effect an action wherein the alleged villein is plaintiff and demands to have his freedom declared. Meanwhile he is to be treated as a free man;

¹ Cart. Rams. (Rolls ed.) i. 236-7, Nos. 155, 156, about A. D. 1110, directed to the bishop of Lincoln and county of Huntingdon; the form is "*Sciatis me fecisse conventionem*," etc. Thirteenth-century fines in the same book, e.g. No. 34, page 127, are in the form settled not later than Glanvill's time. See Glanv. viii. 23: "*Haec est finalis concordia facta in curia domini regis*," etc. And see P. & M. ii. 96. The official preservation of a counterpart appears to date from 1195.

"he shall be in seisin of freedom" — a phrase worth remembering for the light it throws on medieval habits of thought. Freedom, like land, is not everybody's to enjoy. It is a thing of value, and as such it can be possessed, inherited, or released from adverse claims by a charter.¹ It would perhaps be rash to attribute a great part to humanitarian motives in this royal jurisdiction. False claims of villeinage might well be calculated, if not designed, to deprive the King or other lords of tenants and services; even false confessions of villeinage to avoid an immediate adverse judgment were not unknown. But a court which interferes in these matters on the side of freedom, when it interferes at all, must appear in a favorable light to those who are benefited by its action, whatever the ultimate grounds may be. The King had the credit of protecting men in their persons as well as in their possessions against the hand of the spoiler. *Deposuit potentes de sede et exaltavit humiles.*

Payment of money due, where there was nothing else in issue, seems to have been enforced by the King's court only by way of exception, and not as a matter of regular duty, down to the middle of the thirteenth century. Long afterwards the judges were still anything but sure of their footing in this region; more than once or twice they lost heart and turned back from a promising line of advance; and it was only in the latter half of the fifteenth century that the formidable rivalry of the canonists, who were drawing business from them to the Church courts, drove them to acquiesce in the invention of a comprehensive form of remedy for breaches of agreement. But the bold creations of Henry II. had effectually laid the foundations of the King's justice as an expansive power before the end of the twelfth century. The shocks which the King's personal influence received through the perversity of John and the weakness of Henry III. left this untouched; and in the latter years of the thirteenth century the wise policy of Edward I. consolidated his ancestor's work into a system of exceeding strength and stability. Then, and for long afterwards, the King's justice was by no means the only justice in the realm. But from the days of Edward I. at latest it was destined to overshadow all rivals.

Frederick Pollock.

¹ Glanv. Book. V. is the authority for all this. The treatment of an affirmative exception as a preliminary counter-claim is not anomalous in itself, but rather characteristic of medieval dialectic. It persisted in Scotland down to modern times. See L. Q. R. ix. 274.

UNFAIR COMPETITION BY THE DECEPTIVE USE OF ONE'S OWN NAME.

THE protection of manufacturers of established reputation against unfair competition is a branch of the law which has developed rapidly during recent years. Various causes have combined to multiply the number of valuable trademarks and trade-names, and to widen the area in which they are known. "Hood's Sarsaparilla" is blazoned on rocks and fences from New York to San Francisco, in every continent there is a demand for "Bass's Ale," and it would be easy to add almost indefinitely to a list of the names which have been rendered of great worth by the care and skill of their owners in making a good article and advertising it well. Around these makers of reputation there have sprung up, like parasites, a crowd of imitators, seeking, by various fraudulent devices, to divert to themselves a little of the trade destined for the manufacturer whom they copy.

Courts of equity have been constantly called upon to suppress new and original methods of accomplishing the same old purpose of deception. On the whole, they have moved steadily forward in the direction of preventing any fraud whatever, but the progress has been sometimes slow and hesitating through fear of unduly hampering and embarrassing fair and reasonable competition.

A class of cases which presents peculiar difficulties is that which forms the subject of this article. If a man whose name is "Bass" sets out to make and sell ale in competition with the genuine, and adopts bottles of the usual shape, the identity of name will alone deceive numbers of purchasers who want "Bass's Ale," but do not observe the details of the labels. How far can the courts go in protecting the original maker against this deceptive and damaging competition without unduly trenching on the right of the second Bass to use his own name and to carry on any lawful business? The answer towards which the judges are steadily moving is that the new maker must so differentiate his goods from the original that they will not deceive, or, at least, must make reasonable efforts to diminish the deception which will naturally follow from the similarity of name.

The inherent difficulty in dealing with such cases has been frequently increased by speaking as if they involved questions of trademark, a closely analogous, but yet materially different subject.

A trademark is an arbitrary, distinctive mark affixed to the goods by the manufacturer or distributor to indicate their origin. The first person to use such a mark has an exclusive right to it as applied to the particular articles in question, so that it has even been said that he has a property right in it, and that it is because imitations interfere with this right that the court protects him against them.¹ The more accurate opinion, both historically and as a matter of principle, is that the injury to the plaintiff's trade by any uncalled-for imitation of his names, colors, or other indicia, causing the defendant's goods to pass as the plaintiff's is a fraud, and that this fraud is the basis of the court's jurisdiction.² But as applied to a true trademark, consisting of an arbitrary name or symbol, the latter opinion usually leads to the same practical results as the former, because the imitation of such a distinctive mark by a competitor is never justifiable, and, if continued after notice that it deceives, is clearly a fraud, so that on either view an injunction necessarily follows. The result is that, for many purposes, and subject to certain qualifications, there is practically property in a trademark strictly so called.

It is not, however, every name or mark which can be thus appropriated to the exclusion of the rest of mankind; such a monopoly of any word which a new maker would naturally wish to use in describing his product would be intolerable. For example, there can be no trademark in geographical names indicating the locality where the product to which they are applied grows or is manufactured, nor in words indicating that an article is made under certain patents, or, more correctly, the presumption of fraud which arises from the imitation of a peculiar and distinctive mark does not arise when the word copied is a natural and appropriate appellative.³ In the latter case the mere use of the word is not necessarily wrongful; the plaintiff must show something more in

¹ See opinion of Lord Westbury, in *Hall v. Barrows*, 4 DeG. J. & S. 150, 158, and opinion of Fuller, C. J., in *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 548.

² See per Holmes, J., in *Chadwick v. Covell*, 151 Mass. 190, 193; per Blackburn, in *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, 29, *et seq.*

³ Cf. *Coffman v. Castner*, 87 Fed. Rep. 457.

order to maintain his right to relief. The simplest way to show that the acts of the new maker are wrongful is to prove that he is using the word untruthfully; no honest occasion for adopting it can then exist,¹ and the court will interfere, not because of the fraud upon the public, but to prevent the unnecessary, and therefore wrongful, imitation of the plaintiff. Many other instances at once suggest themselves in which unfair competition by means of deceptive devices which are not infringements of any trademark will be enjoined. For example, imitations of the capsule of a champagne bottle, or of the shape of a box, have been prevented,² and so have certain deceptive uses of geographical names, and other descriptive words, which were not, strictly speaking, untruthful.³

The fraudulent use of his own name is a special example of the unfair use of a word which a new maker has a right to employ fairly. No difficult question arises except when he is using his own true name either alone or as part of the name of a firm of which he is really a member. If he has assumed the name, even by leave of court, the use of it in any way whatever in competition with an old maker will be enjoined;⁴ a corporation, which can choose its own name, will not be allowed to use one similar to that of any existing concern in the same line of business,⁵ and of course the purchase of a name, either by means of a fictitious partnership or in any other way, will not confer any right to use it if it too closely resembles that of an earlier dealer.⁶ Deception and injury caused in any of these ways are needless and unjustifiable, and will therefore be prohibited as a matter of course. But a man himself has a certain right to use the name with which he is born in any business which he actually carries on, even if he incidentally deceives the public and injures an earlier dealer; and

¹ See, for example, *Newman v. Alcord*, 51 N. Y. 189, in which it is held that a manufacturer of cement at Akron, who called his product "Akron Cement," could enjoin a manufacturer at Syracuse from imitating the name. Cf. acc. *Pillsbury & Washburn Flour Mills v. Eagle*, 86 Fed. Rep. 608; *Birmingham Vinegar Brewery Co. v. Powell*, [1897] App. Cas. 710; *California Fig-Syrup Co. v. Worden*, 86 Fed. Rep. 212, and cases cited.

² *Von Mumm v. Frash*, 56 Fed. Rep. 830; *Baker v. Baker*, 77 Fed. Rep. 181.

³ *Atwater v. Castner*, 88 Fed. Rep. 642.

⁴ *Pinet v. Pinet*, [1898] 1 Ch. 179.

⁵ *Hendriks v. Montagu*, 17 Ch. D. 638; *Holmes, Booth, & Haydens v. Holmes, Booth, & Atwood Mfg. Co.*, 37 Conn. 278; *Charles Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *Wm. Rogers Mfg. Co. v. R. W. Rogers Co.*, 70 Fed. Rep. 1017.

⁶ *Melachrino v. Melachrino & Co.*, 4 Pat. Rep. Eng. 215; *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

the extent and limitations of this right have been the subject of many adjudications.

In the comparatively early case of *Croft v. Day* (1843),¹ we find some of the principles stated and applied. The plaintiff was the manufacturer of Day & Martin's blacking. The defendant's name was Day, and by an agreement with a friend named Martin he was making blacking under the name of "Day & Martin," and using packages similar to those of the plaintiff. No fac-similes are given in the report, nor is there even a full description of the labels, but the following quotation from Lord Langdale's frequently cited opinion shows the scope and purpose of the decision:—

"It has been very correctly said that the principle in these cases is this. That no man has a right to sell his goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion that, in my opinion, the right which any person may have to the protection of this Court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

By the terms of the injunction the defendant was restrained from selling any composition described as, or purporting to be, blacking manufactured by Day & Martin, in bottles having affixed thereto the labels complained of, or any other labels so contrived or expressed as to represent the composition sold by the defendant to be the same as that sold by the complainant.²

In that case the wrongful character of the defendant's acts was apparent and there can be no question of the correctness of the

¹ 7 Beav. 84.

² This decision is followed and similar injunctions granted in *Clayton v. Day*, 26 Solicitors Journal, Pt. 1, 43 (1881); *Clayton v. Day*, 76 L. T. J. 79 (1883); *Schweitzer v. Atkins*, 37 L. J. Ch. 847, 848 (1868); *James v. James*, L. R. 13 Eq. 421 (1872); *Fullwood v. Fullwood*, Weekly Notes for Law Reports, 93 (1873); *Fullwood v. Fullwood*, 9 Ch. D. 176 (1878); *Holloway v. Holloway*, 13 Beav. 209 (1850).

decision. In *Burgess v. Burgess*,¹ on the other hand, we have an instance in which the acts of the defendant were deceptive and probably fraudulent, but where nevertheless relief was refused because he was not doing anything with which the court felt justified in interfering. The plaintiff had for many years been selling at No. 107 Strand a sauce for fish which he called "Essence of Anchovies." The defendant, the plaintiff's son, established himself as a rival, and placed over his door a plate with the words "Burgess Fish Sauce Warehouse, late of 107 Strand," and sold his sauce under the name "Burgess's Essence of Anchovies." On an application for an injunction, Kindersley, V. C. restrained the defendant from continuing the use of the door-plate, and the words "Late of 107 Strand," but refused to prohibit the name "Burgess's Essence of Anchovies." The Lord Justices affirmed this decision, Lord Justice Knight Bruce, saying, "All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauce, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us." The court referred to the circumstance that the motion was a preliminary one as an additional reason for refusing the injunction, and this is not the only instance in which plaintiffs in these cases have failed on a preliminary motion who might perhaps have succeeded had they waited until all the details were brought out on a final hearing. Still there can be no doubt that this decision is not what we should expect to see rendered now on similar facts; perhaps the principles of law would be stated in the same language, but their application would be likely to lead to a different result, because less close imitations are now regarded as deceptive and enjoined. It is noticeable that as a rule the more cases of this kind a court has before it, the less hesitation there is in prohibiting any unnecessary similarity. Experience satisfies the judges that such resemblances are not accidental, and they are not inclined to give the wrongdoer the benefit of any doubt there may be as to the success of his design. In a case like the Burgess case, the new maker would probably now be required to use his christian name and to refrain from any such combination of the name Bur-

¹ 3 De G. M. & G. 896 (1853).

gess with the words "essence of anchovies" as would cause his product to be known as "Burgess's Essence of Anchovies."¹

The character of the plaintiff's trade may have been a factor in the decision. Different articles are sold to different classes of persons and according to the education and carefulness of the purchasers is the degree of distinction necessary to protect the old maker. A striking application of this rule is found in the case of *Johnston v. Orr Ewing*,² relating to the imitation of a ticket on cotton goods, the *ratio decidendi* of which is thus stated by Lord Selborne. "But although the mere appearance of these two tickets could not lead any one to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language, as equally symbolical of the plaintiffs' goods."

Most things are probably now sold to a larger, more heterogeneous and less careful class than they were when *Burgess v. Burgess* was decided. A man's trade is no longer confined to his own neighborhood, but is often world-wide, and in this fact lies one of the grounds for the increased strictness of the courts in preventing imitations.³

We can see the progress in England from two recent decisions of the House of Lords on the closely related subject of the unfair use of descriptive names.

In *Montgomery v. Thompson*,⁴ it appeared that the plaintiffs and their predecessors had for a hundred years carried on a brewery at Stone, and their ale had become known as "Stone Ale." The defendant built a brewery at Stone over which he placed the words "Montgomery's Stone Brewery," with a device containing the words "Stone Ale" and a monogram somewhat resembling the plaintiff's trademark. An injunction was granted against carrying on the business of a brewer at Stone under the title of "Stone Brewery" or "Montgomery's Stone Brewery" or

¹ *Reddaway v. Banham*, [1896] App. Cas. 199; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. Rep. 1017; *Baker v. Baker*, 77 Fed. 181; *Baker v. Sanders*, 80 Fed. Rep. 889.

² L. R. 7 App. Cas. 219, 225.

³ As is said by Putnam, J., in *LePage Co. v. Russia Cement Co.*, 51 Fed. Rep. 941, 945 ff. "The difference is between dealing with a local community understanding all the circumstances, and dealing with the great public, scattered throughout the United States, with no opportunities of information, except what is communicated to them by the word, 'LePage' in combination with the word 'glue.'"

⁴ [1891] App. Cas. 217.

under any other title so as to represent that the defendant's brewery was the plaintiff's brewery, and from selling any ale or beer not the plaintiff's under the names "Stone Ales," or "Stone Ale," or in any way so as to induce the belief that such ale or beer was of the plaintiff's manufacture. In the course of his opinion Lord Herschell says "The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the person seeking the injunction had a right of property in a particular name."

Reddaway *v.* Banham,¹ is an even more striking case. The plaintiff was the manufacturer of "Reddaway's Camel Hair Belting" and for many years had succeeded in preventing rival makers of belting from using the name "Camel Hair," all parties assuming that as applied to belting it was a fancy name. The defendant Banham stamped his belting "Camel Hair Belting" with no other name or distinguishing feature. Reddaway applied for an injunction and, to every one's surprise, the defendant succeeded in proving at the hearing that his belting and also the plaintiff's was chiefly made of camel's hair so that the name was not fanciful or arbitrary, and the defendant insisted that he used it simply to describe his product truthfully and correctly.

The case was left to a jury to find answers to certain questions and they found as follows: —

"Q. 1. Does camel hair belting mean belting made by the plaintiffs as distinguished from belting made by other manufacturers?

"A. Yes.

"Q. 2. Or does it mean belting of a particular kind without reference to any particular maker?

"A. No.

"Q. 3. Do the defendants so describe their belting as to be likely to mislead purchasers and to lead them to buy the defendants' belting as and for the belting of the plaintiffs?

"A. Yes.

"Q. 4. Did the defendants endeavor to pass off their goods as and for the goods of the plaintiffs so as to be likely to deceive purchasers?

¹ [1896] App. Cas. 199.

"A. Yes."

Upon this evidence, Collins, J., granted an injunction restraining the defendants from continuing to use the words "Camel Hair" in such manner as to deceive purchasers into the belief that they were buying the belting of the complainant's manufacture and thereby passing off their belting as and for the belting of the complainant. The court of appeals¹ reversed this decision and entered judgment for the defendant. The House of Lords, on the other hand, reversed the decision of the court of appeals, declared that judgment ought to be entered for the plaintiff and ordered an injunction restraining the defendants from using the words "Camel Hair" as descriptive of, or in connection with, belting manufactured by them or either of them, or belting not being of the plaintiff's manufacture sold or offered for sale by them or either of them without clearly distinguishing such belting from the belting of the plaintiff.

Halsbury, L. C., said, "For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence; and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow."

Lord Herschell discusses the matter more fully. Commenting on the statement of the Master of the Rolls that you cannot restrain a man from telling the "simple truth;" and that this was all the defendants had done when they called their belting "Camel Hair Belting," he says, "I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it and be known and intended to understand it in its secondary sense it will none the less be a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and who knows and intends this to be the case, is surely not to be absolved from a

¹ Lord Esher, M. R., Lopes and Rigby, L. JJ.

charge of falsehood, because in another sense which will not be conveyed and is not intended to be conveyed, it is true."¹

This exposition of the law by the House of Lords is especially interesting because the facts had been found by the jury, and the court had only to determine whether the evidence justified the verdict, and if so, whether the verdict warranted an injunction. Usually such cases come before a tribunal which passes on both law and fact, and perhaps the lords might have hesitated at finding, as the jury in substance did, that the use of two simple English words accurately describing the defendant's product was deceptive and that the words were used with the intention of passing off the goods as those of the plaintiff. But they did not feel any doubt that the evidence supported such a verdict nor that on such a verdict an injunction must issue.

The House of Lords has not yet had occasion to apply the principles enunciated in *Reddaway v. Banham* to cases of rival traders of the same name; but there can be little doubt that they will so apply them unhesitatingly when the occasion arises; and in that very case Lord Herschell classes a man's own name with other examples of descriptive words which must not be used deceptively, saying: "*The name of a person*, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the

¹ During the argument this interesting colloquy occurred:

Asquith, Q. C. "When once you have established this proposition that the secondary meaning of this term had become the dominant meaning, that is to say, that 'Camel Hair Belting' was understood in the market as belting made by the plaintiffs, and not merely as belting made of camel hair, then any person using that name in that market, even though he might do it innocently—(Lord Herschell.—Innocently, at any rate, until he found that he was interfering with somebody else.) Yes; the moment his attention is called to the fact that he is interfering with some other person, from that moment his user becomes illegal. (Lord Herschell. Then comes the question whether from that time he does it honestly. He may accidentally do it of course, but when he finds that he is deceiving people he is not entitled to go on doing it.)" 13 Rep. Pat. Eng. 223.

defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff."

There are three recent decisions on this subject in the English court of appeals, of which the most interesting is *Brinsmead v. Brinsmead*.¹

The Brinsmead family, who, in 1894, were represented by the plaintiffs John Brinsmead & Sons, had been for sixty years in the business of making pianos, and "Brinsmead pianos" were famous. Thomas Edward Brinsmead and his sons George and Sidney Brinsmead were employed by the firm. In October, 1894, they left that employ, and became themselves manufacturers of pianos, in partnership with one Wilcox, under the name of T. Brinsmead & Sons. John Brinsmead & Sons applied for an injunction which was granted by Romer, J., prohibiting all the members of the new firm from carrying on the business of pianoforte manufacturers or dealers under the name of T. Brinsmead & Sons, or under any name so closely resembling the plaintiff's name as to be calculated to lead to the belief that the business carried on by the defendants was the plaintiff's business, "or under any name or style of which the word 'Brinsmead' forms a part, without also adding thereto the words 'Thomas Edward,' or other the full Christian name of the oldest member of the firm whose name may be Brinsmead and without also including as part of the name or style, the surname of every other member of the firm whose name may not be Brinsmead, etc., etc."

After this injunction, Wilcox at once retired from the partnership, and the name Thomas Edward Brinsmead & Sons was adopted by the defendants. They then transferred their business to a corporation "Thomas Edward Brinsmead & Sons, Limited," and immediately proceedings were instituted against this corporation by John Brinsmead & Sons. North, J., granted a preliminary injunction as follows: — From using the name Thomas Edward Brinsmead & Sons, Limited, or the name of Brinsmead in connection with the manufacture, sale or hire of pianos, without adding thereto an express statement that the defendant company are distinct from and have no connection with the old firm of John Brinsmead & Sons." This was affirmed by the Court of Appeals.

In considering the weight to be given to this case it must be remembered not only that there was a great deal of evidence of

¹ 12 L. T. R. 631; 13 L. T. R. 3 (Oct. 28, 1896).

fraudulent intention which undoubtedly had its effect on the minds of the judges, but also that the decision of the Court of Appeals relates to the assumption by the defendant of a corporate name; on the other hand however, the defendant succeeded to the business of a firm and thereby acquired as good a right to use the name as its predecessors had,¹ and, moreover, the order of Romer, J., related to a firm name, and the Court of Appeals not only approved this order, but intimated that they would have granted the same relief against the firm which they did against the corporation; Lord Justice Lindley saying: "it appears to me that when the three Brinsmeads tried to get rid of this order, by getting rid of Wilcox and carrying on business under their own name and selling pianos under their own name of Thomas Edward Brinsmead & Sons, although it might not have been possible to commit them for contempt of this order, I cannot doubt for a moment that Mr. Justice Romer would have made a fresh order restraining them, if it had been supplemented by evidence that the course of business did mislead the public and did induce them to buy the defendant's pianos for the plaintiff's."

The case in all its stages certainly indicates a willingness to go a long way in restraining a man in the use of his own name if the use is deceptive.

There have been two decisions on the subject by the same court in favor of the defendant. The report of *Jamieson v. Jamieson*² is so brief that it is impossible to draw from it any reliable conclusions.³ *Turton v. Turton*⁴ was a bill to enjoin the

¹ *Fish v. Fish*, 87 Fed. Rep. 203.

² 14 L. T. R. 160.

³ Since the above text was in type a full report has been published in 15 Rep. Pat. Cas. (Eng.) 169, from which it appears that there were three manufacturers of harness dressing in Aberdeen all named Jamieson, viz., Peter Jamieson, James Jamieson, and the plaintiffs Jamieson & Co. Peter Jamieson was much the oldest, and when the plaintiffs first started he compelled them by legal proceedings to adopt certain distinguishing features; although their packages and labels remained generally similar to his. The defendant, whose labels the plaintiffs sought to have enjoined had not imitated any of the distinctive points in the plaintiff's labels, but only those common to the trade, and the Court of Appeals thought that if the peculiarities adopted by the plaintiffs were sufficient to prevent their goods from being mistaken for Peter Jamieson's, they must also be enough to distinguish them from the defendant's. The plaintiff's case also presented other difficulties; nevertheless the opinion of Byrne, J., granting an injunction in the lower court, seems more in accord with the progressive spirit shown by the recent decisions of the House of Lords.

⁴ 42 Ch. D. 128.

use of the firm name John Turton & Sons. The plaintiffs had for many years carried on the business of steel manufacturers under the name of Thomas Turton & Sons. The defendant John Turton had for nearly as many years carried on a similar business in the same town, first as John Turton and then as John Turton & Co. In 1888 he took his two sons into partnership with him and carried on business under the firm name of John Turton & Sons. There was no evidence of any imitation of trademarks and labels nor of any other attempts to deceive the public; no objection was made to the use of the name Turton which had been used by the defendant for years and was accompanied by his full Christian name; the only thing asked was an injunction against the use of the words "& Sons." There was some evidence of confusion, but whether any part of this was due to the addition "& Sons" was not made clear. The Court of Appeals refused an injunction without hesitation and in the course of his opinion in *Reddaway v. Banham*, Lord McNaghten expresses surprise that so simple a case was ever reported.

It is in the recent American cases that we find the best instances of the application of the general principles so clearly stated by the House of Lords to imitations of which the keystone is similarity of name. It is true that the distinction between such cases and those involving trademarks strictly so called was at first often overlooked, so that in some early decisions, injunctions were refused for the simple but inadequate reason there could be no trademark in a man's own name. On the whole, however, the results reached have generally been satisfactory. In *McLean v. Fleming*,¹ an important and leading authority, we have a good illustration of a deception worked even more through the ear than through the eye. The complainant as successor to one Dr. McLane, made and sold "McLane's Liver Pills" and "Dr. C. McLane's Celebrated Liver Pills." They were put up in wooden boxes with wrappers on which the names given above were plainly printed in white on a black and white background. The defendant James McLean, put up pills in a somewhat similar box, on which were the words "James H. McLean's Universal Pills, or Vegetable Liver Pills," in white letters, but the arrangement of the letters and the character of the background was different. An injunction was issued and in the course of his opinion Mr. Justice Clifford thus states the

¹ 96 U. S. 245.

basis of the decision. "Chancery protects trademarks¹ upon the ground that a party shall not be permitted to sell his own goods as the goods of another; and therefore he will not be allowed to use the names, marks, letters or other indicia of another, by which he may pass off his goods to purchasers as the manufacture of another."

It would be needless to give here in detail the many similar cases in which injunctions have been granted because the danger of confusion due to the similarity of name between the plaintiff and defendant was increased by the adoption by the defendant of colors, forms and designs used by the plaintiff.² Some of the most important are referred to below in discussing the extent of the relief which should be granted. *Williams v. Brooks*³ is worthy of special notice because the forms of packages used by both the plaintiff and defendant were in general use in the trade, and entirely *publici juris*; but when used by a person of the same name they were deceptive and therefore their use by him was enjoined, although any one whose name was different might have used them freely.⁴

Neither is it necessary to discuss elaborately the numerous cases in which injunctions have been refused.⁵ In one of the latest of these, *Duryea v. National Starch Co.*,⁶ the plaintiff and appellee was the proprietor of the business of manufacturing the well-known Duryea's starch at Glen Cove. The defendants, who were all named Duryea, formed a partnership to make and sell starch under the name Duryea & Co. The case arose on a motion for a preliminary injunction which was granted by the circuit court. The Court of Appeals for the Second Circuit in reversing this decision says:

¹ Throughout the opinion the plaintiff's name and indicia are inaccurately spoken of as a trademark.

² *E. g.* *Landreth v. Landreth*, 22 Fed. Rep. 41; *Stonebraker v. Stonebraker*, 34 Md. 444; *Devlin v. Devlin*, 69 N. Y. 212; *Shaver v. Shaver*, 54 Ia. 208; *Britannia Co. v. Parker*, 39 Conn. 450; *Williams v. Brooks*, 50 Conn. 278; *Meyer v. Bull Vegetable Medicine Co.*, 58 Fed. Rep. 884; *Pillsbury v. Pillsbury*, 64 Fed. Rep. 841.

³ 50 Conn. 278.

⁴ See *Baker v. Baker*, 77 Fed. Rep. 181.

⁵ *E. g.* *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Gilman v. Hunnewell*, 122 Mass. 139; *Meneely v. Meneely*, 62 N. Y. 427; *Rogers v. Rogers*, 53 Conn. 121; *Rogers v. Simpson*, 54 Conn. 527; *R. W. Rogers v. William Rogers Mfg. Co.*, 70 F. R. 1019; *Duryea v. National Starch Co.*, 79 Fed. Rep. 651; *Fish Wagon Co. v. La Belle Wagon Co.*, 82 Wisconsin, 546.

⁶ 79 Fed. Rep. 651, 652.

"It cannot be denied that by continuous and rightful use for forty years, the name of 'Duryea's Starch' had become identified with its 'source of manufacture,' and that an attempt by persons of the name of 'Duryea' or of any other name, to put upon the market their own product under the name of 'Duryea's Starch' could be suppressed. Inasmuch as the defendants have not called their starch by this well-known name, and have not assimilated the labels upon their packages to those long used by the manufacturers at Glen Cove, the question is whether the defendants have made such an unnecessary and unfair use of the name of 'Duryea' as to deserve the unfavorable criticism of a court of equity."

In the various Rogers cases arising out of imitation of plated forks and spoons and similar articles bearing the name of Rogers, the plaintiffs have encountered two difficulties. First, there are a number of different manufacturers all entitled to use the word "Rogers" so that persons seeking the goods of any particular maker must necessarily scrutinize their purchase carefully. Second, the method of applying the word is to stamp it on the under side of the shank of the fork or spoon, which is much the most natural place. Accordingly, although the word "Rogers" thus stamped is likely to mislead, the courts have not yet seen their way to interfere, provided the imitator uses his initials. He could not be required to stamp his name elsewhere, nor to omit it, and so long as it appears on the shank, it will cause confusion and deceive. Something might be gained by requiring him to use a distinctive name or device which would become the short trade name of the goods, coupling it with a statement that it is made by him; or the form of injunction used in *Brinsmead v. Brinsmead* might be adopted.¹

Wherever relief is granted, this question of the form of the injunction is of great importance. It is always hard to determine what restrictions can reasonably be imposed upon the public to protect a plaintiff's reputation and good will; and those which hamper a man's use of his own name may be very onerous and must be cautiously imposed. There is no difficulty in requiring a defendant to use his full name and to refrain from using any of the plaintiff's colors, forms and symbols. But suppose his christian name is the same as the plaintiff's, or suppose the plaintiff does not accompany his name with any indicia, so that his product can

¹ *Vide supra*, page 252.

only be distinguished by his name. Then the courts must, in order to give adequate protection, require the defendant to take some affirmative action. This they will do if the character of the articles imitated make it possible, but they will not rashly interfere with defendant's business or impose unreasonable restrictions upon him.

In England the usual form of injunction is stated by A. L. Smith, L. J., to be against "selling, etc., without clearly distinguishing his make from the old make."¹ In the United States it can hardly be said that there is any usual form; the Supreme Court in a case relating to the use of the name of a patented sewing machine after the name had become *publici juris* by reason of the expiration of the patent, granted an injunction prohibiting its use, "without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Co."² The value of such general decrees as these depends on the construction given them in case of contempt proceedings. If they are interpreted as requiring radical efforts to prevent any one from being misled, such for example as those prescribed in *Picon v. Picon*,³ then they are all that could be desired and the English form at least does seem to require that something effective be done; but the form used in the Singer case might be literally complied with without giving up the phrase "Singer Machines" if the defendant added the words "made by the June Mfg. Co." Such an addition might perhaps be sufficient to prevent deception in the case of a comparatively expensive article such as a sewing machine. But on cheaper commodities, the buyers would often not read beyond the first two words and the defendant's goods would still sell as "Singer's" almost as readily as the genuine. To permit the imitation of such short names used by buyers and sellers to describe the goods is very dangerous; and it is not necessary, as every honest purpose of the defendant could be accomplished by stating that his machine "operates by the Singer method."

In *Meyers v. Dr. B. L. Bull Vegetable Medicine Co.*⁴ the extent of the injunction to be granted was the subject of special consideration by the United States Circuit Court of Appeals of the

¹ 13 L. T. R. 3; cf. however the detail injunctions in the Brinsmead case quoted *supra*, pages 252-3.

² *Singer Mfg. Co. v. June*, 163 U. S. 169.

³ *Infra*, page 259.

⁴ 58 Fed. Rep. 884.

Seventh Circuit. In the Court below, the respondents had been restrained from using the words "Dr. Bull's Cough Syrup" and other forms of expression containing these words upon any label resembling the labels of the complainant, but not from using the words on labels not resembling the complainant's. It was held in the Court of Appeals that they should be prohibited from using the words on any style of label.

In *Baker v. Sanders*,¹ where the plaintiff was the original manufacturer of Baker's chocolate and the defendant was the agent for one W. H. Baker of Virginia, the United States Circuit Court of Appeals for the second circuit, formulated a very carefully worded injunction against using in connection with the business of making or selling chocolate the word "Baker" with or without initials, "so as to indicate that the chocolate is a variety of 'Baker's Chocolate'; but the defendant may indicate in appropriate language that the chocolate is made, prepared or sold for or by W. H. Baker of Winchester, Virginia."

For special reasons the Court in that case gave the defendant an option, instead of changing his labels, to affix to each package the statement "W. H. Baker is distinct from the old chocolate manufactory of Walter Baker & Co."

In *Baker v. Baker*,² in the same circuit, Judge Shipman granted an injunction in the first form given by the Court of Appeals as above without any alternative.

In *Allegretti v. Keller*,³ the second form was adopted on a motion for a preliminary injunction.

Owing to the French practice of minutely and completely defining the rights and obligations of the parties, some of their decrees are most interesting examples of what justice and fair dealing require in cases of this character.

In *Roederer v. Roederer*,⁴ the plaintiffs Théophile Roederer & Co., of Rheims, were makers of a well-known brand of champagne having a valuable reputation, and defendants organized a partnership under the name of Louis Roederer & Co., to sell champagne, and advertised themselves widely. Louis Roederer had never had anything to do with the manufacture of champagne and was a stranger in the city, so that there was no doubt of fraudulent intention. Nevertheless, as Louis Roederer was a real member of

¹ 80 Fed. Rep. 889.

² 87 Fed. Rep. 209.

³ 85 Fed. Rep. 643.

⁴ Dalloz, Recueil Périodique, 1865, pt. 2, page 87 (Brown Trademarks, sec. 438).

the firm and took part in carrying on the business the court declined to grant an injunction against the use of the name Louis Roederer & Co., but required that the full first name should be used in all cases and also that the words "house founded in 1864" should be added.

In *Société Thérèse Picon et Comp. v. Picon et Comp.*¹ it appeared that the bitters made by Gaetan Picon had acquired a great reputation and become generally known as "Picon Bitters" but sometimes as "African Bitters." Thérèse Picon, a daughter of Gaetan, and her partner undertook to sell bitters under the name of "Thérèse Picon & Company" in competition with the proprietors of her father's business. An injunction was granted prohibiting the defendants from using, either as a mark or in any way in the business of making or selling bitters, the names "Bitters of the daughter Picon" or "Bitters of Thérèse Picon," or "African Bitters" or even "Bitters" alone and requiring them to use "Bitters" followed by some qualification or adjective with the statement underneath "made by Thérèse Picon & Co. House founded in 1888." It was further ordered that the letters in which the words "Bitters" and its qualification were printed should be twice as large as those used for the statement "Made by Thérèse Picon & Co." and that the word "Thérèse" should be printed in letters of the same size and color as the "Picon."

The details covered by this decree are all of importance, especially the efforts to guard against the defendant's goods being known as "Picon Bitters" by requiring the use of some adjective that may become the short trade name of their product and by prescribing a style of printing calculated to produce this effect. These provisions show what the defendant ought to do in order to properly comply with the forms of injunction in use in the American and English courts, which require him in general terms to plainly distinguish his goods from the plaintiff's, and the result should be substantially the same in case proceedings for contempt have to be taken.

It is to be observed that the plaintiff's right to be protected against loss and injury to his trade caused by deception, so far as this protection can be afforded without unreasonably restricting trade, does not depend on any intentional fraud or bad motive of the defendant.

¹ Dalloz, *Recueil Périodique de Jurisprudence Générale*, 1894 I, page 348 (Cour de Cassation).

Referring to *Sanders v. Baker*, Morrow, J., says in a recent case: "It was held by the Circuit Court of Appeals that one entering into competition with another person of the same name, who has an old and established business, is bound to distinguish his goods from those of the latter, so as to prevent confusion."¹ And this is a correct statement of the effect of that and of other recent decisions, with only the qualification that the defendant is not required absolutely to prevent deception of the public, but only to make real and appropriate efforts to do so. Nothing is said about fraud; the right, as above defined, exists equally, whether the deception is accidental or of set purpose. "Courts, in such cases, do not require proof of any peculiarly iniquitous 'perfidious dealing.' If the representation as to what or whose the goods are is calculated to deceive the purchaser into buying them as goods of the complainant, equity will enjoin its continuance, although the 'deceitful representation' was placed upon them carelessly, or from lack of appreciation of the meaning it would convey to the purchaser, or from an honest mistake as to the defendant's right to use it."²

The rule is the same in England. In *Mitchell v. Henry*,³ Lord Justice James says: "The defendants must bear in mind that the original honesty of intention does not protect the continued user, if the user is found practically to have the result of deceiving, or is calculated to deceive purchasers, because it is very easy for manufacturers to avoid any possibility of misleading the purchasers if they are minded to avoid it."⁴

In *Reddaway v. Banham*, Lord McNaghten refers to the finding of the jury that the defendant endeavored to mislead as not necessary for the relief asked.⁵

One is presumed to intend the consequences which a reasonable man would naturally foresee, and if he begins or continues a deceptive package after the fact that it is injurious has been pointed out, his actions are dishonest, and the only remaining question is whether the deception can be prevented without imposing undue restrictions on business. If it can there is fraud in the sense of a court of equity; otherwise, the plaintiff's loss is due to a decep-

¹ *California Fig-Syrup Co. v. Worden*, 86 Fed. Rep. 212, 216.

² *Tarrant v. Hoff*, 76 F. R. 959, 961. See also 51 Fed. Rep. 947.

³ L. R. 15 Ch. D. 181, 191.

⁴ See also *Army & Navy Soc. v. Co-operative Society*, 8 Patent Reports, Eng. 426, 429. Cf. *Allen v. Flood*, [1898] App. Cas. 1.

⁵ [1896] App. Cas. 219, and *vide ante*, page 249.

tion which cannot be prevented, and the burden must lie where it falls.

No doubt the courts have sometimes been led to grant more stringent decrees than they would otherwise have done, because they were impressed with the defendant's fraudulent character, and convinced that if he were given an inch he would take an ell;¹ but almost all the injunctions above quoted were intended as definitions of the plaintiff's rights irrespective of the defendant's motives.²

It is an important fact, however, which must not be overlooked, that when a business has been begun by imitation, labels and advertisements which would otherwise be innocent may operate as a continuation of the original fraud, and should for that reason be stopped.³ The previous conduct of the defendant is, therefore, in every case one of the circumstances to be considered in determining what form of injunction is appropriate, or what decree should be made in contempt proceedings. Indeed, all the surrounding facts may have a bearing on the question of what efforts should be required of a new maker to prevent his goods from passing as those of the old one. The precautions which would be reasonable and effective in the case of pianos may be unsuitable as applied to flour, and certain articles, such as plated ware, present peculiarly difficult problems.

The cardinal principle that anything which may deceive is *prima facie* wrongful, and should be prevented if possible, is the only safe guide, and it is most encouraging to see that, as the commercial value and importance of long-established business reputations, and the opportunities for making unjust gains by fraudulent imitations are more clearly recognized, the courts are more and more willing to grant the needed protection, and show an uncompromising determination to do their part towards maintaining commercial honesty and fair dealing.

W. L. Putnam.

¹ *Montgomery v. Thompson*, [1891] App. Cas. 217; 8 Patent Reports, Eng. 426, 429.

² (*E. g.* *Reddaway v. Banham*, *Singer Mfg. Co. v. June*, *Baker v. Sanders*, *Baker v. Baker*, 87 Fed. Rep. 209.)

³ *Cf. LePage Co. v. Russia Cement Co.*, 51 Fed. Rep. 941, 946.

"POWERS COUPLED WITH AN INTEREST."

IT is a matter of practical importance to fix with precision the meaning of the phrase "a power coupled with an interest," because it is in constant use in the affairs of life, because it connotes a valuable legal right, and because it has been variously construed by the courts.

The incident of a power coupled with an interest which gives it special value is that it may be executed after the death of the person who gives it.¹ On account of this quality of such a power, there has been much litigation arising from the efforts of donees of powers to show that their powers are coupled with interests.

The leading case on this subject in the United States is the one just cited, in which the opinion was delivered by Chief Justice Marshall. It is the precedent to which litigants refer with confidence to sustain conflicting views, yet there seems to be no ambiguity in its meaning, or any omission in its exposition of the subject. While it declares the indestructibility of a power coupled with an interest by the death of the maker, it industriously expounds and limits its meaning.

The "power coupled with an interest" intended by Chief Justice Marshall when he used these words in the case cited, seems plainly to have been that power which accompanies estate or title in a thing real or personal, or that right in a chose in action which is metaphorically spoken of as title or estate. It is one of the group of powers constituting ownership. It is in fact title or estate or ownership, and is contrasted with a common law power of disposition over property given by a power of attorney.

The following is the language of the Court in that case: —

"We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. . . . The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest

¹ *Hunt v. Rousmanier's Administrators*, 8 Wheaton, 174.

are united in the same person. . . . But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. . . .

"We know that a power to A to sell for the benefit of B, engrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing."

In speaking of the instrument under consideration in *Hunt v. Rousmanier*, it was said, "This instrument contains no powers of conveyance or of assignment, but is a simple power to sell and convey."

It was also held that an interest in that which was to be produced by the exercise of the power, or the interest in the proceeds of a sale made under a power to sell did not constitute a power coupled with an interest.

The case of *Hunt v. Rousmanier* is an illustration of this distinction. In that case a power of sale of a vessel had been given to the donee of the power as security for a loan. It was held that such a power did not constitute a power coupled with an interest.

The phrase "an authority coupled with an interest" (in which the word "authority" is equivalent to "power") is to be found in Coke, by whom it was construed as it is in *Hunt v. Rousmanier*. A customary power in the lord of a manor to grant estates in fee simple is, according to him, "an authority coupled with an interest."¹ A power in a *tenant for years* to receive livery of seisin for a remainder-man is a power coupled with an interest.² The power in the patron and in the ordinary to confirm a lease made by a person (parson) is a power coupled with an interest, and so is the power of a disseisee to confirm a lease made by a disseisor.³ In commenting upon section 169 of Littleton, Coke says that a devise that the executors may sell is a bare power, but a devise of lands to executors to be sold is a power coupled with an interest.⁴ On the other hand, power to deliver seisin by the force of a deed of feoffment is not a power coupled with an interest.⁵

¹ Coke upon Littleton, 52 b.

² Coke's Commentary, § 520, Littleton.

⁴ See also Coke upon Littleton, 181 b.

³ Coke upon Littleton, 49 b.

⁵ Coke upon Littleton, 52 b.

A power of attorney to receive rents is not a power coupled with an interest.¹

In the case of *Hunt v. Rousmanier*, it was decided not only that the power under consideration in that case was not coupled with an interest, but that powers not coupled with an interest do not survive the makers of them. It is to be borne in mind, however, that while this decision is in general terms, it is by virtue of the context to be limited to common law powers and does not refer either to powers under the Statute of Uses or to equitable powers.

In substance, therefore, the decision in *Hunt v. Rousmanier* is that where the title or estate in property or in a chose in action is transferred by way of security, the title or estate survives the death of the grantor or assignor, and the security continues good after such death; but that where a common law power over property or a chose in action is given by way of security, the power ceases on the death of the maker of the power. The first branch of the decision is of course a truism, and the stress of the opinion is on the latter point.

The ruling in *Hunt v. Rousmanier* has been followed in many of the American cases.

Where there is a power of sale contained in a mortgage, it has been held to be a power coupled with an interest.²

In *Houghteling v. Marvin*,³ it was decided that where a mere power is given to a creditor to receive a debt as a security to him but there was no assignment, the power is revoked by the death of the principal.

In *McGriff v. Porter*,⁴ it is said that a patent to enter upon the lands of the principal and to take and sell the stores given as a security is not a power coupled with an interest, and is revoked by the death of the principal.

Where A gave a power to prosecute a suit for lands and agreed to give B one half of the proceeds of the land, and gave him a mortgage to secure this agreement, it was held that the power was not coupled with an interest.⁵

Where one having a power of sale in a vessel with power of sub-

¹ Willes's Reports, 105, note.

² *Bergen v. Bennett*, 1st Caine's Cases, 1804, per Kent, J.; see also *Connors v. Holland*, 113 Mass. 50.

³ 7 Barbour, 412.

⁴ 5 Fla. 373.

⁵ *Gilbert v. Holmes*, 64 Ill. 549; see also *Tharp v. Brennigan*, 14 Iowa, 251; *Chambers v. Seay*, 73 Ala. 373; *Walker v. Dennison*, 86 Ill. 142.

stitution relinquishes all his interest in her, no legal title passes by such relinquishment, as the attorney has no interest in the vessel, but only a power to sell.¹

In *Taylor v. Benham*,² the Supreme Court of the United States held that a devise that the whole of the property of a testator be sold (which power vested in the executors) was not a power coupled with an interest.

In *Loring v. Marsh*,³ a power conferred upon the trustees, who were also invested with the legal estate, is said to be a power coupled with an interest.

A being indebted to B, executed a power of attorney authorizing B to receive moneys which should become due to A from C; it was held, inasmuch as the power of attorney not accompanying any assignment of the debt due from C to A, and not forming part of any security given for the debt due from A to B, the power of attorney was revoked by death.⁴

But neither in England nor in the United States are the decisions uniform as to the meaning of the words "power coupled with an interest." In the courts of both countries there are cases in which a common law power over property is said to be a power coupled with an interest *when it is given for the benefit of the donee of the power*.

In *Smart v. Sanders*,⁵ it was said that "where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable."

In *Clerk v. Laurie*,⁶ Williams, J., said:—

"What is meant by an authority coupled with an interest being irrevocable is this, that where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable."

The case of *Godolphin v. Godolphin*⁷ was as follows:—

"A testator devised to his *sister* and her heirs forever, with a direction to settle the property on such of the descendants of the testator's mother

¹ *Bingham v. Clark*, 20 Pick. 43; see also *Story, Agency*, § 469; *Mechem, Agency*, § 205.

² 5 How. 233.

⁴ *Lepard v. Vernon*, 2 Vesey & Beames, 5.

⁶ 2 H. & N. 199.

³ 6 Wallace, 354.

⁵ 5 C. B. 917.

⁷ 1 Vesey, 21.

as his *sister* should think fit, and the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid. Lord Hardwicke said: 'It is objected that a *femme covert* cannot execute a power, and that there are no words in the will authorizing her to do so; but this is a power *without an interest*, and is improperly called a power, for, being a direction to a person who has the fee, it is rather a trust.'

Hearle *v.* Greenbank¹ was this: —

"The legal estate was devised to trustees upon trust for an infant *femme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *femme covert* his heir at law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, 'This is a power *coupled with an interest*, which is always considered different from naked powers.'"

In Knapp *v.* Alvord,² a power to sell personal property given to secure the donee of the power was held to be a power coupled with an interest.

In Peter *v.* Beverly,³ a power in a will not accompanied by a devise of the legal estate was said to be a power coupled with an interest.

The last English case on this point is that of *In re Hannan's Express Gold Mining & Developing Co.*, Carmichael's Case, decided July 27, 1896,⁴ which is as follows: —

"P promoted a company for the purpose of purchasing from him and working a mining company. C signed an underwriting letter addressed to P, by which he agreed, in consideration of a commission, to subscribe for 1000 shares in his company. C further agreed that the agreement and application should be irrevocable, and notwithstanding any repudiation by him should be sufficient to authorize P to apply for shares on behalf of C, and the company to allot them. P by letter accepted these terms.

"The authority given to P by the underwriting letter to apply for shares on behalf of P was an authority coupled with an interest and therefore not revocable. Lopez, L. J., said: 'The question that really arises is whether in this case it is an authority coupled with an interest. I think the answer is a very short and very complete one. What was the

¹ 1 Vesey, 298.

³ 10 Peters, 235.

² 10 Paige, 205 (N. Y. 1843).

⁴ [1896] 2 Ch. 643.

object? The object was to enable Mr. Phillips, the Vendor, to obtain his purchase money, and in the language of Williams, J., it therefore conferred a benefit on the donee of the authority.'"

While in the cases just cited a common law power over property given for the benefit of the donee of the power is said to be "a power coupled with an interest," this view in many of the cases is not necessary to the decisions, and they could have been decided as they were in accordance with the principle in *Hunt v. Rousmanier*, without holding that the powers under consideration were coupled with interests. The issue in many of the cases (as, for instance, in the one last cited) was as to the revocability of the powers *inter vivos*; they were powers given on valuable consideration as security to the donees, and such powers, though held in *Hunt v. Rousmanier* not to be coupled with an interest, were there declared to be irrevocable *inter vivos*.

In the case of *Jeffries, Administrator, v. The Mutual Life Insurance Company*,¹ recently decided by the Supreme Court of the United States, a meaning was attributed to the words "a power coupled with an interest" different from both of the two meanings above discussed.

In this case the facts were that Charles W. Jeffries, administrator, employed Laurie and Crews, attorneys at law, to prosecute a claim against The Mutual Life Insurance Company of New York on a policy of life insurance given to his testator. Jeffries gave the attorneys full power to compromise the suit as they should please, and agreed that they should have a portion of the proceeds of the suit as compensation. The attorneys agreed with him to prosecute the claim. Charles W. Jeffries died during the pendency of the suit, and Cuthbert S. Jeffries, who had been made administrator of the testator, was substituted as plaintiff in the suit in 1873. In 1879 Laurie made a compromise with the Insurance Company and entered satisfaction in the suit, which the plaintiff sought to set aside. The issue in the case was whether the power to compromise given by the first administrator continued in force after his death. The Court on this subject said:—

"The contract made by the first administrator having given to the attorneys *a power coupled with an interest*, the authority to compromise was not impaired by the death of the first administrator, and *his successor was bound by the contract*."

¹ 110 U. S. 305.

It was conceded that the power to compromise given to the attorneys by Charles W. Jeffries came to an end with his death unless it was "coupled with an interest." The usual rule of law is that a power given to an agent may be revoked at the will of the principal or is revoked by his death, the agent who is dismissed in breach of his contract of employment having his remedy in a suit for damages. The case last cited turned, therefore, upon the meaning of the words "power coupled with an interest."

Now a power given to an attorney to compromise a suit is entirely different in kind from the power considered in *Hunt v. Rousmanier*. The latter was a power over property, the *jus disponendi*. The former did not concern property; it was not an estate, it was not a power to dispose of property; the exercise of it did not directly create a fund; it was not given as security. It was not coupled with an interest in the sense in which Hunt's power was claimed to be. It was coupled with an interest only in the sense that it was one step towards the attorney's obtaining the compensation agreed to be paid to him for his agency. Most powers in an agent are in such a sense coupled with an interest and would be on that ground irrevocable.

In the later case of *Missouri v. Walker*,¹ the facts were these: The State of Missouri entered into a contract with Walker to employ him as his agent for prosecuting certain claims of the State against the United States. By the contract it was agreed that the State would deliver to him the vouchers relating to the claims, and he was authorized to prosecute them in Washington. For his services he was to receive a contingent fee. The State afterwards repudiated its contract. Walker demanded certain vouchers which came within the scope of the contract, and they were refused to him. He then filed a petition for mandamus to compel the delivery of the vouchers. His petition was denied by the State court, and its judgment was affirmed on error by the Supreme Court of the United States.

In this case the Court cited with approval and followed the decision in *Hunt v. Rousmanier*, and decided that the agency of Walker was not coupled with an interest and was revocable. It said: —

"There is nothing, therefore, in the consideration for the employment to prevent this agency from being revoked like any other. The interest coupled with a power to make it irrevocable must be an interest in the

¹ 125 U. S. 339.

thing itself. . . . Here there was no actual assignment of the claims or any part of them. . . . There is nothing whatever in the transaction from beginning to end which shows an intention on the part of the legislature to part with any interest with or control over the claims, except to the extent of the commissions for the agent after they had been earned. . . . Clearly such an agency is not irrevocable in law because of its being coupled with an interest in the thing to be collected."

This case seems in effect to overrule *Jeffries v. The Mutual Life Insurance Company*, although it does not purport to do so.

The above summary of decisions justifies the remark made in the beginning of this article, that the law relating to "powers coupled with interests" is unsettled; it is not necessary to argue that this state of the law should not continue. What construction of such powers should prevail is a topic of jurisprudence. The suggestion may, however, be ventured that adherence to the principle of *Hunt v. Rousmanier* is the best policy. Nothing could be gained by declaring common law powers over property, even when given as security, irrevocable by death, because the result intended by giving to powers that effect can be always secured by a mortgage or charge. It would, however, be a substantial practical gain to put an end to the contention, not an unusual one, that a power of an agent to represent his principal cannot be revoked because the agent is to be remunerated for his services.

James Lowndes.

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THE LAW SCHOOL. — The following table shows the registration in the School on November fifteenth for ten successive years : —

	1889-90	1890-91	1891-92	1892-93	1893-94	1894-95	1895-96	1896-97	1897-98	1898-99
Res. Grad.	—	—	—	—	—	—	—	—	I	I
Third year	50	44	48	69	66	82	96	93	130	102
Second year	59	73	112	119	122	135	138	179	157	169
First year	86	101	142	135	140	172	224	169	216	218
Specials	59	61	61	71	23	13	9	31	41	58
Total	254	279	363	394	351	402	467	472	545	548

The first year class is larger than that of last year, though not quite equal to the last class entering under the old rules, the class of three years ago. There is a considerable falling off in the numbers of the present third year class, largely to be explained by the fact it is the last class whose members can remain away from the school a year and still take their degree. The men of this class who have not returned make 32 per cent of the whole class this year, as against 28, 36, 30, 34, and 44, respectively, in the five preceding years. The percentage of men failing to return for their second year is also increased, being 25 per cent, as against 7, 23, 28, 24, and 27 in previous years. It is noteworthy, however, that in this class only 6 per cent of those who passed their examinations have failed to return.

The number of men who withdrew or did not take their examinations last year was 16 per cent in the first year class and 6 per cent in the second year class, as compared with 9 per cent and 3 per cent, respectively, in the preceding year.

The addition of 5 per cent to the required passing-mark has apparently had some effect; but nevertheless the number of men in the school is larger than ever before.

The following are the usual tables showing the sources from which nine successive classes have been drawn, both as to previous college training and as to the geographical districts from which they have come :—

HARVARD GRADUATES.				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76

GRADUATES OF OTHER COLLEGES				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	107

HOLDING NO DEGREE.					
Class of	From Mas- sachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218

Twenty-nine of the men in the present first year class who hold no degrees are Harvard seniors on leave of absence.

The following thirty-four colleges have conferred their first degrees on members of the entering class, the figures indicating the number of men from each college, where there are more than one: Yale (30), Amherst (8), Bowdoin (7), Brown (7), Princeton (5), Boston College (4), Dartmouth (4), Tulane University of Louisiana (4), Williams (4), Holy Cross (3), Oberlin (3), University of Chicago (3), Earlham (2), Tufts (2), Stanford University (2), University of New Brunswick (2), University of Virginia (2), Colby, College of the City of New York, Cornell, Georgetown, Iowa, Indiana University, Knox, Massachusetts Institute of Technology, Miami, Ohio Wesleyan, University of California, University of Georgia, University of Nebraska, University of North Carolina, University of Wooster, Western Reserve. The increased number from Yale is particularly interesting.

THE NATIONAL BANKRUPTCY ACT. — It is cause for satisfaction that the entire country is now subject to a uniform law of bankruptcy. Any law must be a gain, and the present law seems to be in most respects a very good one. The few criticisms that might be made relate for the most part to provisions which were probably carefully considered, and were deemed by those in charge of the law, if not wise, at least expedient in order to secure its passage. A perusal of the statute as a whole certainly gives the impression that the interests of the debtor are protected somewhat more carefully than those of the creditor. A discharge is granted without regard to the dividends, or lack of them, from the bankrupt's estate and without the assent of any part of the creditors. The bankrupt's own misconduct is the only ground for refusing a discharge. The acts of bankruptcy affording ground for a creditor's petition do not include non-payment of judgments, commercial paper, or other debts. An insolvent debtor, who can refrain from making fraudulent conveyances or giving or allowing preferences, may avoid bankruptcy indefinitely; and on the other hand, if a debtor can show that the aggregate of his property at a fair valuation is sufficient in amount to pay his debts, no act will make him liable to be adjudicated a bankrupt. The most objectionable feature of the law is the provision that "a wage-earner or a person engaged chiefly in farming or the tillage of the soil" is not subject to involuntary bankruptcy, though entitled to petition voluntarily if he chooses. On the face of it this seems to create privileges in special classes, the unconstitutionality of which may invalidate the entire law. The nearest thing to a precedent for such legislation is contained in the Bankruptcy Act of 1841, which allowed all classes to petition voluntarily, but restricted to traders liability to involuntary bankruptcy; but there seems a marked distinction in degree, at least, between the present law and the earlier one. Doubtless the Supreme Court of the United States will not overthrow the act lightly, and may find a reason for the exemption of wage-earners and farmers other than a desire to give them special privileges as such.

THE RULE IN DUMPOR'S CASE. — In 1603, the court of Queen's Bench sitting at Westminster, decided the case of *Dumpor v. Symms*, 4 Co. 119, b. There was a condition in a lease that the lessee and his assigns should not assign it without the consent of the lessor. Once with the consent of the lessor the lessee conveyed his term; and the court decided that the condition was thereby destroyed, that the lessor could not enter when the assignee himself transferred the lease. Why the court so decided no one knows. Perhaps they were impressed by the fact that the lessee on receiving the license became virtually dominus of the term. More probably they thought that they were applying a rule in regard to the waiver of a breach of condition, although the lessee, in acting with the lessor's consent, had committed no breach to be waived; he simply availed himself of the only means allowed him of assigning his term without breaking the condition. Whatever the reason, Dumpor's case became the law of England, and remains so except where superseded by act of parliament.

The extent to which the rule prevails in America is uncertain. Almost always it is held inapplicable. Where there is a license to assign, and the right to re-enter for breach of condition is destroyed, the question arises whether or not the right to sue on the covenant for subsequent assign-

ments still subsists. Then the case must be met where there is no condition, merely a covenant. The shade of Dumpor's case is still powerful, and recently controlled the Court of Appeals of Maryland when the last-mentioned question was presented to it. *Reid v. Weissner & Sons Brewing Co.*, 40 Atl. Rep. 877. The lessee there covenanted for himself not to assign the lease without consent; there was no condition. He once assigned with the lessor's consent, and the court holds, upon the authority of Dumpor's case, that the lessor cannot complain when the assignee transfers his interest. True, the decision might have been put on the ground that the assignee, not being mentioned in the covenant, could not have been bound in any event; but this ground is not noticed by the court. Yet the rule in Dumpor's case properly has no application to a covenant, and should not be extended by logic when it is not founded on any sound principle. *Paul v. Nurse*, 8 B. & C. 486. Dumpor's case itself contained no covenant; and in *Brummel v. MacPherson*, 14 Ves. Jr. 173, the English case which adopted the rule into the modern law, it was admitted in the argument that if the lease in question had contained a covenant, the covenant would have lived after the condition died. In America, too, what little authority there is tends generally in the same direction. *Dakin v. Williams*, 22 Wend. 201, 209; *Gannett v. Albree*, 103 Mass. 372. It is doubly unfortunate that the rule in Dumpor's case should be extended in the principal case when the decision might have been placed on other grounds, and when the application of the rule cannot be excused by the fact that it avoids a forfeiture.

TUG-BOAT MARRIAGES AND THE LEX DOMICILII. — A scheme to avoid unpleasant marriage laws has gained some notoriety on the Pacific coast. Relying on the principle that the validity of the marriage is to be judged by the law of the place of its celebration, the parties sail outside the three-mile limit, are married by the skipper, and, according to their statement, return wedded by the law of the high seas. This device met a deserved fate at the hands of the Supreme Court of California when it came before them in the case of *Norman v. Norman*, 54 Pac. Rep. 143. The above formula had been gone through by two persons whose ages according to California law would have prevented their marriage without the consent of their parents. A week after their return the would-be wife tired of the marriage state and went home. Suit was thereupon brought to have the marriage affirmed. The court, however, granted the prayer of the defendant that the plaintiff be "precluded from ever setting up to be her husband."

The decision is doubtless sound, but the reasoning is not quite satisfactory. The parties, say the court, went away simply to avoid compliance with the law of their domicile; this marriage therefore will not be held valid unless contracted under some recognized law. No such law here existed, and the marriage was void. While there is little authority on the point, it seems nevertheless clear that cases may exist of marriages which are valid though celebrated under no recognized law. If parties are travelling abroad and under the local law they cannot validly marry, they may contract in the forms used in their domicile, and the marriage will there be recognized. *Kent v. Burgess*, 11 Sim. 361. Under such circumstances it has been said that, if these forms could not be complied with, there might be a good marriage by mere consent of the parties.

Lord Campbell, in *Beamish v. Beamish*, 9 H. L. Cas. 274. Theoretically, too, it is generally recognized that parties cast away on an unknown island could marry according to their own forms. Granted that all other conditions to a valid marriage are present, it is hard to discover in what way the presence of fraud upon the home law can be of any effect. It is punishable, but it cannot change the environment on which validity depends. See 11 HARVARD LAW REVIEW, 546. However this may be, the court would have been more clearly correct had they based their decision on the admitted principle that a ship carries with it the law of its State. *Crapo v. Kelly*, 16 Wall. U. S. 610; *McDonald v. Mallory*, 77 N. Y. 546. By this principle the parties were practically married in California, and were subject to the State laws.

MERGER OF CHARGES. — When there have been successive mortgages upon land and the first mortgagee buys up the first equity of redemption, it is of practical value to him to know whether that mortgage is extinguished. If it be extinguished, the second mortgagee has a first charge for which the land is liable; if, however, the first may still be regarded as existing, the second mortgage remains a second. When the land is not of sufficient value to satisfy both incumbrances the importance of the question is apparent. Equity, in accordance with sound justice, laid down the rule that when a charge, of any nature, vests in the owner of the property subject to that charge though *prima facie* it is merged, yet it may be regarded as existing if the holder has expressed an intention to that effect, and, in the absence of evidence of an intention, the court will consider what is most advantageous for him. *Forbes v. Moffatt*, 18 Ves. Jr. 390. But equity will not aid fraud, so there came a modification, — that a mortgagor who pays off the first charge cannot hold his extinguished debt as a shield against a second incumbrance. With this modification, *Forbes v. Moffatt* is still the law in the United States. *James v. Moray*, 2 Cow. 246; *Factors, &c. Ins. Co. v. Murphy*, 111 U. S. 738.

In England, however, the case of *Toulmin v. Steere*, 3 Mer. 210, declared that this modification extended to a purchaser of the equity of redemption, and that if he later obtained the mortgagee's interest in the land, he might not keep it alive to defeat the claim of a second incumbrance of which he had notice. The ground taken was that the purchaser with notice from a mortgagor should not be in a better position than the mortgagee. But it seems clear that he stands in a different relation to the mortgagor. He is not a debtor; he is not attempting to set up an extinguished debt. He paid for the mortgagor's rights in the land, and there is no reason why the second mortgagee should have his claim turned into a first mortgage by a transaction to which he is a stranger, in which no such result was intended by the parties. This is, indeed, the typical case where equity will interfere according to *Forbes v. Moffatt*, and the later decision is the more remarkable because the opinions in both cases were delivered by Sir William Grant, M. R.

The new doctrine was often adversely criticised, then entirely metamorphosed by Jessel, M. R., in *Adams v. Angell*, 5 Ch. D. 646, who explained that its application was limited to cases where there was no evidence of intention in regard to merger. Even thus restricted, the doctrine was at variance with *Forbes v. Moffatt*, and continued to be dodged and ignored until *Liquidation Estates Purchase Co. v. Willoughby*,

44 W. R. 612. In this case, according to the view taken by the Court of Appeal, there were three contemporaneous mortgages; one of the mortgagees assigned all his interest to the mortgagor, and there was later a foreclosure. Although the fund mortgaged was insufficient to pay the mortgage debts, the mortgagor wished to share in the fund by virtue of the assignment to him, claiming that there had been no merger. The court, after noting *Toulmin v. Steere*, restated the doctrine of *Forbes v. Moffatt*, that in the absence of evidence as to intention, equity would interfere to prevent merger when it would be to the interest of the parties, though in the case before them, they found evidence of a contrary intention which defeated the claim of the mortgagor. Although the mortgages were contemporaneous, it seems the case is practically that of a mortgagor trying to hold up a past debt as a shield to an existing one. The decision is the more notable, then, for so far from following *Toulmin v. Steere* in extending the modification to *Forbes v. Moffatt*, the court tend to restrict it. The case has recently come before the House of Lords, 46 W. R. 589. The decree which the lower court had affirmed was varied on other grounds, but the statements of the law as to merger seem to have been approved. It is probable, then, that Sir William Grant's error has been wiped out by the slow processes of the law, and that *Toulmin v. Steere*, first doubted, then curtailed, is now practically overruled.

SALES BY AUCTION. — The fall of the hammer in a sale by auction marks the conclusion of the contract between vendor and vendee, but that contract is worthless without a memorandum sufficient to satisfy the Statute of Frauds. In the case of *Johnson v. Boyes*, Irish Law Times, vol. xxxii. p. 460, after the agent of the plaintiff had been declared the highest bidder at an auction, — it does not appear whether for land or goods, — the vendor interposed and instructed the auctioneer not to complete the formal record of the contract. The plaintiff, during the pendency of an action at law, made application for an interlocutory injunction to restrain a second sale. Justice Stirling denied the application. It seems he was clearly right; the claim was at best a doubtful one, and so no ground for an injunction, and the plaintiff could show no enforceable contract on which to base his rights. *Farmer v. Robinson*, 2 Camp. 339 (note); *Warwick v. Slade*, 3 Camp. 127. The infrequent *dicta* which suggest that the auctioneer's authority to make the memorandum cannot be revoked after the hammer has fallen, are merely attempts to evade the statute.

The question naturally arises whether the disappointed vendee has a cause of action against the auctioneer. Probably no court would spell out a contract, that the auctioneer promised that his authority would not be revoked. Nor does it seem possible that the vendee could sue the auctioneer in tort on the ground that he has not done his duty as the vendee's agent. It is true it has been held that a memorandum of sale written by an auctioneer is a memorandum by an agent of the vendee and so sufficient to satisfy the Statute of Frauds, but the agency which the law sees imposes no duty to make a memorandum. It is clear, from the language of the cases, that it amounts merely to this, — that the vendee, by a nod or a lift of his hand, permits the auctioneer to sign the memorandum for him. *Emmerson v. Heelis*, 2 Taunt. 38; *Bird v. Boulter*, 4 B.

& Ad. 443; *Gill v. Bicknell*, 2 Cush. 355, 358. To shift the hardship of the statute from the parties to the contract to their go-between, the auctioneer, would be to disregard principle and serve no business interest.

THE CONSIDERATION IN COMPROMISES. — It is an accepted rule of law that a forbearance to sue may be a good consideration to support a contract. It is equally accepted that if the claim forborne is unreasonable and dishonest, the contract is unenforceable on grounds of public policy. The case of a claim reasonably disputed recently arose in New York. *Cox et al. v. Stokes et al.*, New York Law Journal, Oct. 15, 1898. In that case the respondents had promised the appellants to perform a railroad reorganization agreement, the consideration for that promise being that the appellants, the reorganization committee, should discontinue litigation pending against the respondents. The court held that this forbearance to press a disputed claim was good consideration.

This decision represents the law in almost all jurisdictions. *Cook v. Wright*, 1 B. & S. 559; *White v. Hoyt*, 73 N. Y. 505. Whether the claim is reasonable, or unreasonable but *bona fide*, would seem to make no difference in principle; for the claim is in each case actually invalid, and the better authority holds that a forbearance to sue in each case is a good consideration. *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Prout v. Pittsfield Fire District*, 154 Mass. 450. To determine upon principle whether in either case the consideration is valid, involves a questioning of the accepted theories of consideration. The most scientific hypothesis ignores the benefit to the promisor and fastens upon the detriment to the promisee. But it limits detriment to legal detriment, — doing or refraining in any case whatever when the promisee had a legal right to adopt a contrary course. To apply this test in the case of compromise — can a court say that it is a legal detriment to forbear from pursuing a claim which in fact is invalid? A Mississippi court has been logical enough to decide that in such case there is no consideration, and indeed no other conclusion seems possible, if the theory of legal detriment be held. *Gunning v. Royal*, 59 Miss. 45.

That theory, however, is found to fail elsewhere in the law of contract. Where a debtor compounds with his creditors, where a promisee gives a consideration which he is already obliged by contract to perform, and where one innocently performs a tort at request, good considerations are found which could never be by the theory of legal detriment. The just result reached in all of these cases seems to point to a broader test of *prima facie* consideration than that of legal detriment — the test of actual detriment. There are many grounds of public policy which make *prima facie* obligations unenforceable. Such a rule of policy of broad application is the legal detriment rule itself, and the error which leads to its adoption as a basis of consideration instead of a secondary rule in regard to the enforcement of contracts is thus explained. In the present case the evident policy of the modern law to favor business compromises as an escape from litigation prevails, and the *prima facie* obligation supported by an actual detriment is undisturbed. But the fact remains that in such a case there is no legal detriment, and it can be explained upon no narrower conception of *prima facie* consideration than actual detriment — any act, forbearance, or promise given by the promisor at the request of the promisee.

CONSTRUCTIVE GRAND LARCENY. — Where property stolen consists of separate articles or has different owners, and where the act of asportation is separable, the question will often arise, when must the prosecution proceed for several larcenies, and when may it indict for a single larceny. The issue becomes of practical importance when the several thefts are merely petty larcenies but the total theft would constitute grand larceny. Such was the fact in two recent cases which illustrate both branches of the general problem. In one, several sheep of different owners were stolen at the same time. This theft was held by the Wyoming court to constitute a single offence of grand larceny. *Ackerman v. State*, 54 Pac. Rep. 288 (Wyo.). In the other case, the prosecutor, a mining company, had missed from its reduction works, at various times, small quantities of cyanide product. The defendant was later found with thirty pounds in his possession. The jury convicted him, upon an indictment, for grand larceny. Upon exceptions, the Nevada court sustained the verdict, taking the ground that where there is a continuing transaction several distinct asportations do not constitute different offences, and the defendant may be convicted upon the final asportation. *State v. Mandich*, 54 Pac. Rep. 516 (Nev.).

The fact that property stolen is of several articles or in separate owners is immaterial, and the decision to that effect by the Wyoming court is unexceptionable. Courts have held otherwise, but, it seems, from mistaken views. *U. S. v. Beerman*, 5 Cranch C. C. 412. It is the entire offence against the State which the criminal law considers, without regard to the circumstance that various civil actions may arise from the same transaction. *Wilson v. State*, 45 Tex. 76. This is none the less true, although in theory a separate indictment might be found for each item. *Reg. v. Brettel*, C. & M. 609. But as a matter of policy, it is generally agreed that the prosecution should bring the whole affair before the court once for all, and that the one time shall be jeopardy of the whole. *State v. Ingles*, 2 Hayward, 4. It follows that any severalty in the property should be disregarded, and that the single test of the entirety of the offence should be the entirety of the act of asportation.

Thus a single act of asportation seems to be recognized as the one requisite of a proper indictment for a single larceny, but the Nevada case cannot be supported without taking the further step of saying that several distinct takings may become a single act by construction. The courts indeed have never been over-precise in determining what will be considered a single transaction. So the leading English case holds that where the thief returned to steal in two minutes after the first theft, it was one "continuing transaction," but where he returned in half an hour the offences were separate. *Reg. v. Birdseye*, 4 C. & P. 386. This concession has been carried to extremes in America. *State v. Martin*, 82 N. C. 672. If the present Nevada case represent the law, whenever a thief accumulates the spoils of his petty larcenies, it will be possible to consolidate the offences under a single charge of grand larceny. *Scarver v. State*, 53 Miss. 407. But is not this theory of a continuing transaction indefensible whenever there is in fact more than a single asportation? If before the last taking there was a time when a complete larceny had been committed, it seems impossible to add this to another larceny and find entirety in the whole criminal transaction. If in the present Nevada case the defendant had accumulated the cyanide with no intent to take possession, and then had taken it away at one time, such a spe-

cial case might be larceny; but in the absence of evidence it should not be presumed that such was the case. At all events, the courts should resist the pressure put upon them by the prosecution to recognize in any form this fiction of constructive grand larceny.

THE CASE OF THE KANSAS CITY LIVE STOCK EXCHANGE. — The decision of the Trans-Missouri Freight Case, that the Anti-Trust Act of 1890 forbade all combinations in restraint of trade, however reasonable, is chiefly limited by the fact that the act can apply only to combinations over which Congress has jurisdiction, and cannot affect the workings of traffic within a State as opposed to interstate commerce. This limitation was considered by the Federal Supreme Court in *Hopkins v. United States*, Advance Sheets, No. 210, October Term, 1898. The combination complained of was the Kansas City Live Stock Exchange, an association of commission merchants interested in the Kansas City stockyards. Their business consisted in selling on commission the live stock which was sent to the stockyards from many markets and many States. Rules were drawn up for the association; one of them prescribed the rates to be charged, another forbade the members to have any dealings with persons who did not conform to the rules. The Circuit Court thought that this association came within the act, and granted an injunction against it; the Supreme Court, however, takes the opposite view, and the injunction is dissolved.

In holding that the association was not engaged in interstate commerce the court is consistent with former decisions. *Emert v. Missouri*, 156 U. S. 296. It is an adequate reason that if the shipper himself for whom the commission merchant acted had come within the State and there sold his cattle, his act in itself could not have been one of interstate commerce. There is no necessity of invoking the other explanation suggested by the court, that even if the sale itself were an act of interstate commerce, the act of the agent in negotiating it might not be included in the category. The further reasoning of the court, however, has wider scope than seems entirely sound. In support of the decision cases are cited in which State statutes were held not to interfere with the commerce clause; it is assumed that in all of them the point decided was merely that the business affected was not interstate commerce. If this assumption is correct, it necessarily follows that the same kinds of business are beyond the control of the Anti-Trust Act, or of any federal statute. Yet some of these cases belong to the class where State statutes are supported in spite of the fact that they regulate commerce between States, where the regulation is not of a kind demanding uniformity and the States are allowed to exercise concurrent control until Congress shall act. *Sherlock v. Aling*, 93 U. S. 103. States may pass rules for pilots, and regulate charges for wharfage; they may fix a standard of fitness for engineers of locomotives crossing their territory, and require licenses to be taken out; but in these matters the United States confessedly might also act and supersede the State statutes. *Cooley v. Board of Wardens of Philadelphia*, 12 Howard, 299; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Nashville, etc., Ry. Co. v. Alabama*, 128 U. S. 96. And if wharfingers or pilots should combine as to rates, or engineers as to terms of service, these combinations would concern interstate commerce even though they might be subject to State legislation; they would then come under the Anti-Trust Act, and, however reasonable, they would be doomed.

CONSTRUCTIVE NOTICE.—The purchaser of the *res* of a trust with notice takes subject to the trust. And notice may be actual or constructive. In the case of *First National Bank v. Broadway Bank*, New York Law Journal, Oct. 12, 1898, a pledgee of stock certificates knew that his pledgor was a trustee but did not know, though he could easily have ascertained, that the pledge was a violation of the trust. After default by the pledgor, he put the certificates up at public sale and bought them in himself. The New York Court of Appeals decided that, though he had no direct information, yet he had constructive notice of the trust; for the facts were such as, in reason, would have put him upon inquiry which would have resulted in discovering the violation by the trustee. The decision seems correct. The same rule would probably be adopted in most of the American courts, and is the law in England since the Conveyancing Act of 1882. It is not likely to depart a great way from substantial justice and is, perhaps, no longer to be quarrelled with.

Yet it is too handy and sweeping a statement,—according to it a mere blunderer who failed to investigate where a reasonable man would have investigated, has constructive notice of what he would have found. But the whole doctrine of notice seems to rest on the idea of fraud, that a purchase with notice is not *bona fide*. The blunderer has done no fraud,—where is the equity against him? The general doctrine should be applied as consistently here as it is in regard to transfers of negotiable paper. If it be carried out logically, the cases of constructive notice may, as suggested by Vice-Chancellor Wigram in *Jones v. Smith*, 1 Hare, 43, 55, be divided into three classes: cases where the purchaser's agent had notice, cases where there was wilful deafness to notice, cases where the purchaser had notice of some incumbrance on the ownership of his vendor but failed to make proper inquiry into the nature of the incumbrance. In the last class there seems a disregard of the rights of possible *cestuis* so reckless that it is inconsistent with a *bona fide* purchase. It is clear that the facts of the principal case showed constructive notice according to this class, as in *Shaw v. Spencer*, 100 Mass. 382; *Duncan v. Jaudou*, 15 Wall. 165. In the course of a long series of decisions the New York courts, which at first strictly adhered to the test that there must be taint of fraud, have gradually lost sight of that fundamental proposition. The resultant error is, perhaps, one of definition rather than substance; yet the principle is blurred and the juryman's standard of the "reasonable man" introduced into equity.

RECENT CASES.

AGENCY — UNAUTHORIZED CONTRACT — RATIFICATION.—Plaintiffs' broker, without disclosing his principals, sold certain stock for them to defendants, at a price unauthorized by plaintiffs. A month later he tendered the certificates of stock, but defendants refused to take them. *Held*, that plaintiffs cannot hold defendants on the agreement, because, the contract being unauthorized, defendants could not have held plaintiffs. *Clews v. Jamieson*, 89 Fed. Rep. (Cir. Ct., Ill.).

The court seems to ignore the doctrine of ratification, and on the statement of facts it is impossible to say when plaintiffs decided to enforce the contract. The tender of the stock certificates by the broker so long after the sale would indicate that probably plaintiffs had then elected to ratify, and gave the broker the certificates to convey them to defendants. If they did so elect before defendants withdrew their assent to the con-

tract, both parties, according to the great weight of authority, would thenceforth be bound to each other. Story, Agency, 9th ed., § 244, 445. If, however, plaintiffs had not elected to affirm at the time defendants first refused to proceed, the case presents the interesting problem discussed in 9 HARV. LAW REV. 60. On principle it should then be too late for ratification to take effect. See *contra*, *Bolton Partners v. Lambert*, 41 Ch. D. 295. The fact that the principal case is one of undisclosed principal should make no difference in the decision.

CARRIERS — LOCATION OF STATION — JURISDICTION. — *Held*, that in the absence of any legislative authority a court of general jurisdiction may compel the location of a union depot, if public convenience so demand. *Concord & Maine R. R. v. Boston & Maine R. R.*, 41 Atl. Rep. 263 (N. H.).

It is admitted that the public has a general legal right to demand reasonable accommodation from the carrier. The conflict, one side of which is represented in the principal case, arises over the question as to whether the public has a specific legal right, enforceable by the courts, to have the carrier act in a particular way. It can hardly be said that the decisions which subject the carrier to such liability are sounder, on legal theory, than those which exempt him from it, but the former cases seem best to comport with public policy. Accordingly, on the matter of the establishment of stations, which is but a special aspect of the broader question, it is to be hoped that the principal case will be followed. *People v. Chicago, etc. R. R. Co.*, 130 Ill. 175; *State v. Republican Valley R. R. Co.*, 17 Neb. 647, *accord*. The opposite view is taken in *Atchison, etc. R. R. v. Denver, etc. R. R.*, 110 U. S. 667; *People v. New York, etc. R. R. Co.*, 104 N. Y. 58.

CARRIERS — RIGHT TO DISCRIMINATE AGAINST HACKMEN. — A railroad company granted the exclusive privilege of plying the business of hackman upon its premises to one person, and forbade all others the use of its grounds for similar purposes. *Held*, that the regulation was a reasonable one, and an injunction would be granted against any one violating it. *N. Y., N. H. & H. R. R. Co. v. Scovill*, 41 Atl. Rep. 246 (Conn.).

In *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, a similar decision was reached, but that case has found support in no other jurisdiction. *McConnell v. Pedigo*, 92 Ky. 465. No authorities are cited by the court in the principal case as sustaining the position taken. That reason, as well as authority, is opposed to the decision is shown in *Montana Ry. Co. v. Langloris*, 9 Mont. 419. Regulations which discriminate between different hackmen should not be upheld, because they foster monopolies, inconvenience passengers, and permit the carrier to profit unjustly at the expense of the public.

CONFLICT OF LAWS — MARRIAGE ON THE HIGH SEAS. — *Held*, that when parties, simply to avoid the law of their domicile, go by boat outside the three-mile limit and there go through the forms of a marriage, the marriage is void. *Norman v. Norman*, 54 Pac. Rep. 143 (Cal., Sup. Ct.). See NOTES.

CONTRACTS — STATUTE OF FRAUDS — PERFORMANCE WITHIN A YEAR. — Defendant received a horse from the plaintiff and agreed orally to keep it a year in return for its use. At the end of the year defendant claimed a lien for keeping the horse. In an action of trover, *held*, that plaintiff can recover. *Martin v. Batchelder*, 41 Atl. Rep. 83 (N. H.).

The defendant contended that, as the contract was not to be performed within a year, it came within the section of the Statute of Frauds providing that such contracts should be in writing. However the court held that, as it would have been fully performed within a year had the horse died within that time, the statute does not apply. This is in accord with the rule of interpretation that where by any possibility the contract may be performed within a year, although such a performance is not within the contemplation of the parties, the statute does not apply. This construction was adopted in two early English cases. *Peter v. Compton*, Skin. 353; *Anon.*, 1 Salk. 280. Later a contrary result was reached in *Reynolds v. Cowper*, Vin. Abr., Tit., Contract and Agreement, 524; but the law was finally settled in accord with the early cases. The same construction has been adopted in this country. *Peters v. Inhabitants of Westborough*, 19 Pick. 364. The great majority of contracts, although not intended to be performed within a year, may by some contingency be completed within that time. The rule in the principal case practically annuls the statute in all such cases, but it is generally law.

CRIMINAL LAW — ATTEMPT TO RAPE — PRESUMPTION OF INCAPACITY. — *Held*, that a boy under fourteen years of age may be convicted of an attempt to commit rape. *Davidson v. Commonwealth*, 47 S. W. Rep. 213 (Ky.).

The case is contrary to the weight of authority. The English cases and the majority of those in America hold that the law conclusively presumes that a boy under fourteen years of age is incapable of committing rape, and therefore can be convicted neither

of an attempt nor of an assault with intent to commit rape. *Reg. v. Phillips*, 8 C. & P. 736; *State v. Sam*, Winston, 300. In some American jurisdictions it is held that the presumption of incapacity is rebuttable by evidence of the boy's actual ability. *Williams v. State*, 14 Ohio, 222. And in Massachusetts it has been decided that though the boy cannot be convicted of rape, he can be convicted of an assault with intent to commit rape. *Commonwealth v. Green*, 2 Pick. 380. This is on the ground that the law does not mean that the boy is actually incapable of committing rape, but that he is too young to be punished for such a serious offence. This is sound reasoning, and the present case, therefore, seems to be correct on principle.

CRIMINAL LAW — CONSTRUCTIVE GRAND LARCENY. — The prosecutor, a mining company, had missed from its reduction works, at various times for several months, small quantities of the product. The defendant was later found with a large quantity in his possession. *Held*, that an indictment for a single grand larceny is proper. *State v. Mandich*, 54 Pac. Rep. 516 (Nev.).

Several sheep of several owners were stolen at one time. *Held*, a single offence of grand larceny. *Ackerman v. State*, 54 Pac. Rep. 288 (Wyo.). See NOTES.

CRIMINAL LAW — PLEADING. — A statute prohibited the sale of liquor "except as hereinafter provided." In a later clause it was provided that the act did not apply to sales by manufacturers or wholesale dealers in quantities of over five gallons, if made in good faith. *Held*, that an indictment framed on this statute need not negative the exception, since it is contained in a clause separate from the enacting clause. *Commonwealth v. Risner*, 47 S. W. Rep. 213 (Ky.).

By the test here laid down it depends entirely upon the location of the excepted matter in the statute whether it must be negated in the indictment. If the exception is stated in the enacting clause, it must be negated; but if it is in a separate clause, whether referred to in the enacting clause or not, it need not be negated. Some authorities make an exception where the separate clause is referred to in the enacting clause. *King v. Pratten*, 6 T. R. 559; *Vavasour v. Ormrod*, 6 B. & C. 430. The true inquiry, however, seems to be whether the separate clause is to be treated as part of the definition of the offence or was only intended to work an exemption from an already fully stated offence. 1 Bish., Crim. Proc., 4th ed., § 631. To this end it seems that a study of the intrinsic nature of the excepted matter with reference to the whole statute would be necessary to a correct solution of the difficulty. The result in the principal case, therefore, appears to have been reached by a technical rather than a logical test, and, in view of the subject-matter, its correctness seems doubtful. *Hirn v. State*, 1 Ohio St. 15; *State v. O'Donnell*, 10 R. I. 472.

CRIMINAL LAW — SELF-DEFENCE — BURDEN OF PROOF. — On a criminal prosecution for homicide, *held*, that the defendant must establish a justification of self-defence by a preponderance of the evidence. *State v. Ballou*, 40 Atl. Rep. 861 (R. I.).

The decision seems unsound on principle, although it has the support of some authority. *State v. Welsh*, 29 S. C. 4; *People v. Milgate*, 5 Cal. 127. In a criminal prosecution the State must prove the defendant guilty beyond a reasonable doubt, and yet, under the rule here adopted, he may be convicted although there remains a doubt which he has produced by evidence which raises a question as to his justification, but does not amount to proof of it. The error has arisen from a failure to distinguish between the effect of an affirmative plea in a civil action, and a justification in a criminal prosecution. A defendant in a civil action admits by an affirmative plea that he has injured the plaintiff. But a defendant in a criminal prosecution does not admit the commission of a crime by acknowledging he did the act for which he is held, and the prosecution does not establish his guilt beyond a reasonable doubt, until it disproves to that extent any excuse he may have raised, the existence of which would make him criminally irresponsible. *People v. Riordan*, 117 N. Y. 71.

CRIMINAL LAW — STENOGRAPHER IN GRAND JURY ROOM. — The defendant in a criminal case pleaded in abatement that a stenographer had been present in the grand jury room while the evidence was given upon which the indictment was found. On demurrer, *held*, that the plea is bad. *State v. Brewster*, 40 Atl. Rep. 1037 (Vt.).

Although the decisions upon the point are to some extent conflicting, this case is supported by the great weight of modern authority, and is correct historically and upon principle. Cf. *Earl of Shaftesbury's Case*, 8 How., St. Tr. 759, 771-5. See 11 HARV. LAW REV. 411.

EQUITY — DEAD BODIES. — Respondent owned a burial lot, and removed the remains of her step-son lawfully buried therein. Complainant, the heir of deceased, brings this bill to compel respondent to return the body to its former grave. On demurrer, *held*, that the bill states a good case. *Gardner v. Swan Point Cemetery*, 40 Atl. Rep. 871 (R. I.).

The case is in line with the generally accepted law on this point. Before interment, when there is discord among relatives of a deceased person as to the place of burial, the wishes of the deceased prevail if known, then those of the husband or wife, and finally of the heirs in order of consanguinity. *Larson v. Chase*, 47 Minn. 307. After interment the law will not encourage disturbance of the remains, and any of the heirs can prevent their removal. *Pierce v. Swan Point Cemetery*, 10 R. I. 227. Yet if interment has taken place without the consent of the person who has the right of determining the place of burial, such person can remove the body. *Weld v. Walker*, 130 Mass. 422. The heirs seem to be regarded as custodians of the remains of their ancestor. It is even held that the right to bring an action against any one who injures a grave-stone, passes, on the death of the person raising the stone, to the heir of the person over whose remains it stands, though he has no title to the land or to the stone itself. 2 Black. Comm. 428; *Mitchell v. Thorne*, 134 N. Y. 536.

EVIDENCE—COMPARISON OF HANDWRITING.—In an action on a note against the maker, other notes written by him were offered in evidence, solely for the purpose of comparing the handwriting in them with that in the note in controversy. *Held*, that the notes are inadmissible. *Wiedman v. Symes*, 74 N. W. Rep. 1008 (Mich.).

In England the introduction of specimens of handwriting for the purpose of comparison was always allowed in the ecclesiastical courts, even though such specimens were not otherwise admissible in the suit. *Baumont v. Perkins*, 1 Phillim. 78. This was prohibited in common-law courts after the development of trial by jury, except in the case of ancient documents. *Taylor v. Cook*, 8 Price, 650; *Doe v. Suckermose*, 5 A. & E. 703. However, it is now permitted by statute in England and in several jurisdictions in this country. In the absence of such a statute, the authorities are divided. *Vinton v. Peck*, 14 Mich. 287; *Moody v. Russell*, 17 Pick. 490. The principal case expresses the better view. The selection of such a standard of comparison is objectionable, since it may involve collateral issues, and may be unfair.

EVIDENCE—JOINT CRIME—ACQUITTAL OF ONE PRINCIPAL.—*Held*, that the acquittal of one of the principals in the crime of adultery does not bar the conviction of the other. *Solomon v. State*, 45 S. W. Rep. 706 (Tex., Cr. App.).

The case is *contra* to the weight of authority, but is correct on principle. *State v. Mainor*, 6 Ired. 340. The rule that the acquittal of one principal in the crime of adultery prevents the conviction of the other had its origin at the time when juries decided cases on their own knowledge. At such times both would naturally have to be convicted or acquitted together. At the present day, however, although it is impossible as a matter of fact that one should be guilty without the other, yet it is possible that the guilt of one should be established by evidence which, owing to the rules of evidence, would be inadmissible to prove the guilt of the other. It seems absurd that the principal whose guilt is clearly shown should escape simply because, owing to technical rules, the other cannot be convicted. It is better therefore to cut loose from this antiquated rule, which to-day has no satisfactory reason for existence. *Alonso v. State*, 15 Tex. App. 378; *State v. Caldwell*, 8 Baxt. 576.

INSURANCE—BENEFIT ASSOCIATIONS—UNILATERAL CONTRACTS.—A Masonic benefit association brought suit to compel defendant, a member of the association, to pay an assessment. The association, on the death of one of its members, assessed the other members a fixed amount, which was turned over to the widow and children of the deceased member. Failure to pay such an assessment forfeited membership and all past payments and future insurance. *Held*, that the payment of these assessments cannot be enforced. *Lehman v. Clark*, 51 N. E. Rep. 222 (Ill.).

Certificates of membership in these associations are generally treated by the courts as policies of insurance, though they differ from other policies in having no fixed premiums, and no fixed amount to be paid to the beneficiary. *Commonwealth v. Wetherbee*, 105 Mass. 161. Membership imposes no liability to pay assessments, the association relying on the self-interest of its members, since failure to pay assessments forfeits membership. The court reasons that each payment completes a unilateral contract of insurance, which lasts until the next assessment becomes due. It has been held, however, that membership does impose such a liability. *Ellerbe v. Barney*, 119 Mo. 632. The rule in the principal case seems more in accordance with the probable intention of the parties; otherwise a member is under a perpetual liability to pay all future assessments, since the by-laws provide no means of withdrawing from membership except through forfeiture for nonpayment of assessments, and this operates only at the option of the association.

MUNICIPAL CORPORATIONS—OFFICERS DE FACTO.—In 1896 the town of Dover reorganized as a city, under a new general statute, and elected officers. In June, 1898 in *quo warranto* proceedings against these officers, the statute was declared unconstitutional. While proceedings in error on this decision were pending, the attorney-general

applied for *mandamus* to the former town officers, ordering them to resume their functions. *Held*, that the application be denied. *State v. Mayor, etc. of Town of Dover*, 41 Atl. Rep. 98 (N. J., Sup. Ct.).

The case shows the tendency of most courts to extend the doctrine of *de facto* corporations. It was recently decided in New Jersey that, though the statute under which a public corporation is organized be unconstitutional, its existence *de facto* cannot be questioned by a private individual. *Coast Co. v. Spring Lake*, 36 Atl. Rep. 21; see also 10 HARV. LAW REV. 452. The principal case goes further and holds that it cannot be questioned even by the State except on *quo warranto* proceedings directly against the supposed corporation or its officers. *Mandamus to the de jure* town officers could not issue until the *de facto* city officers had been actually ousted. See 2 Dillon, Munic. Corp., 4th ed., §§ 844, 894, 895.

PERSONS — PARENTS' RIGHT TO RECOVER FOR INJURY TO MINOR CHILD. — A minor child, while serving a penal sentence which would have expired in a short time, and before its majority, was injured by the negligent act of defendant. *Held*, that the parent may recover for the loss of the child's services. *Ames v. Atlanta Ry. Co.*, 31 S. E. Rep. 42 (Ga.).

The case is interesting because there is very little authority upon the question. It is generally held in this country that a parent may recover for the loss of the services of a minor child, although at the time of the injury the child, with the consent of its parents, was engaged in the service of another. *Bloggs v. Ilsey*, 127 Mass. 191. There seems to be a sufficient analogy between this class of cases and the principal case to lead to the same result. If, however, the child were imprisoned for a period which would not expire during its infancy, the parent could show no right to the services of the child, and a recovery should not be allowed. The case would then be similar to one in which the parent would be prevented from recovering for an injury to the child by reason of the fact that the child had been emancipated before the injury was suffered. *Tiffany*, Persons, 269.

PROPERTY — CHATTEL MORTGAGES — CONSIDERATION ILLEGAL IN PART. — *Held*, that a chattel mortgage given to secure two debts, one of which is illegal for usury, is not wholly void, but will stand as security for the valid debt. *Atkinson v. Burt*, 45 S. W. Rep. 987 (Ark.).

It is well settled that securities for the performance of obligations which are wholly illegal are not binding at law, even when given subsequently to the illegal transaction. *Fisher v. Bridges*, 3 E. & B. 642; *Paxton v. Popham*, 9 East, 407. The doctrine of the principal case, though difficult to support on the authorities cited, has been adopted by some courts. *Carradine v. Wilson*, 61 Miss. 573. The weight of authority, however, seems to hold that even the partial illegality of a debt vitiates for all purposes a mortgage given for its security. *Brigham v. Potter*, 14 Gray, 522; *Williams v. Fitzhugh*, 37 N. Y. 444. This view seems preferable, for the security has a distinctly illegal purpose if any part of the debt for which the security is given is tainted with illegality, and to hold an instrument binding as to its lawful purposes, but void as to its unlawful purposes, is at variance with the expressed intention of the parties.

PROPERTY — CONVEYANCES IN FRAUD OF CREDITORS — POWERS. — S., being in prosperous circumstances, with no intent to defraud either existing or subsequent creditors, made a voluntary conveyance of real estate in fee. On the next day, the grantee reconveyed to S., in trust for S. for life, with powers of aliening, leasing, mortgaging, or devising; and, if not thus disposed of, remainder in trust for the two daughters of S. and their heirs. *Held*, that, although the deeds were duly recorded, they may be set aside by subsequent creditors. *Scott v. Keane*, 40 Atl. Rep. 1070 (Md.).

A conveyance, valid as against existing creditors, can be avoided by subsequent creditors only when made with intent to defraud them. *Kane v. Roberts*, 40 Md. 590. Here, the transaction was admitted to be in good faith; but nevertheless the ample powers reserved were held conclusive evidence of actual fraud. This, is, perhaps, going beyond the existing authorities; but the decision, although possibly judicial legislation, is not unlikely to meet with approval. But another, and, it seems, an untenable position was also taken. If the deed had been upheld, only the life estate would have been liable for the debts of S., who was yet practically owner of the property; and therefore the case was declared to fall within the rule which forbids a man, while retaining the benefits of ownership, to place his property beyond the reach of his creditors. *In re Pearson*, 3 Ch. D. 807; *Brown v. McGill*, 39 Atl. Rep. 613 (Md.). This reasoning confuses conveyances in fraud of creditors and provisions in restraint of alienation. Gray, Restraints on Alienation, 2d ed., § 91. In the one case the whole deed is void, but only as regards creditors; in the other, the unlawful provisions are invalid as against all the world, but the remainder of the deed is unimpeachable.

The authorities do not fully discuss how far the rights of a creditor to avoid a prior fraudulent deed are affected by notice, at the time of contracting his claim, of the earlier conveyance. It seems, however, that actual notice will prevent him from attacking even a deed fraudulent in fact. *Monroe v. Smith*, 79 Pa. St. 459. The principal case reaches a different result when the notice is merely constructive, although the fraud is also only an inference of law.

PROPERTY — COVENANT IN LEASE — DUMPOR'S CASE. — The plaintiff leased land for a term of years, the lessee covenanting not to assign without the written consent of the lessor. One assignment was made with the plaintiff's authority. The assignee in turn assigned the term, but without consulting the plaintiff. *Held*, that the last assignment was valid; for after the first authorized assignment the covenant was destroyed. *Reid v. Weissner & Sons Brewing Co.*, 40 Atl. Rep. 877 (Md.). See NOTES.

PROPERTY — NUISANCE — NOMINAL DAMAGES. — In an action for maintenance of a nuisance, *held*, that a verdict for nominal damages, in the absence of proof of special damage, is proper. *Farley v. Gate City Gas Co.*, 31 S. E. 193 (Ga.).

The case follows the rule, generally accepted in this country, that an action on the case may be maintained to prevent the acquirement of a prescriptive right, although no actual damage has resulted from the alleged nuisance. *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. 247. In England it is held that an action is maintainable only when actual damage has been suffered, until which time, in consequence, a prescriptive right does not begin to run. *Sturges v. Bridgman*, 11 Ch. D. 852. The American doctrine is more satisfactory, as under the English law an adjoining landowner may, after a lapse of twenty years, require the destruction of permanent works which he must have known at the time of their erection would annoy him in the future use of his property.

QUASI-CONTRACTS — WILFUL BREACH OF CONTRACT. — The plaintiff contracted to put plumbing in the defendant's house. Having partly completed the work, he refused without good excuse to proceed. *Held*, that the plaintiff cannot recover on a quantum meruit for work done. *Cochran v. Balse*, 54 Pac. Rep. 399 (Colo., C. A.).

The principal case follows the weight of authority. *Turner v. Robinson*, 5 B. & Ad. 789; *Stark v. Parker*, 19 Mass. 267; *Larkin v. Buck*, 11 Oh. St. 561. Many States, however, allow the plaintiff this action. *Britton v. Turner*, 6 N. H. 481; *Duncan v. Baker*, 21 Kan. 107. The latter line of decisions establishes the better principle if its application is restricted to cases where the plaintiff is in default for the breach of a condition implied in law. The courts have failed to distinguish between such cases and cases where the condition is express. In the latter the plaintiff has wilfully deprived himself of his action on the contract, and there is no ground for allowing him to invoke the aid of the equitable principles of quasi-contract. But if the condition is one implied in law, the defendant can only escape performance of his contractual obligation on equitable grounds, and therefore should not be allowed to retain the benefit of the plaintiff's labor without making fair recompense. See 8 HARV. LAW REV. 364.

SURETYSHIP — RIGHTS OF CO-SURETY — SUBROGATION. — *Held*, that where one of two sureties on a note is obliged to pay the note, he is entitled to put in his claim against the insolvent estate of his deceased co-surety for the full amount of the note, and to receive dividends until reimbursed to the extent of one-half the debt. *Pace v. Pace*, 30 S. E. Rep. 361 (Va.).

The decision is eminently sound. What few adjudications are to be found upon the precise question involved are to the same effect, with the exception of *Institution v. Hathaway*, 134 Mass. 69. A practical and it seems a conclusive objection to a contrary view is that it would make the amount of the burden which the insolvent surety must bear depend upon whether the holder of the original obligation or the co-surety proceed against the surety's estate. That such a result is not necessary upon principle is clearly shown by Professor Ames in 5 HARV. LAW REV. 406. It is generally held that one partner cannot prove in bankruptcy against another for the full amount of a partnership obligation which he was compelled to discharge. *Ex parte Smith*, Buck, 492. But, upon principle, the doctrine of subrogation should be applied as in the cases between co-sureties. The decisions that a joint obligor on a bond may prove against a co-obligor in bankruptcy as a specialty debtor, illustrate still more strikingly the inconsistency of the courts. *Litterdale v. Robinson*, 12 Wheat. 594. See also *Robertson v. Trigg*, 32 Gratt. 76. Why the obligor is subrogated to the creditor's rights as regards the nature of the debt but not as regards the amount is not made apparent.

SURETYSHIP — STATUTE OF LIMITATIONS. — In consideration of a promise by the plaintiff bank to honor an overdraft by a third party, defendant guaranteed repayment, together with interest, to be compounded every six months. *Held*, that though action for the principal sum is barred by the Statute of Limitations, plaintiff can recover for

the interest that has accrued within six years. *Parr's Banking Co. v. Yates*, [1898] 2 Q. B. 460.

The decision has an odd look, as the result is that in such a case a guarantor's liability may continue forever, without further action on his part. The argument for the decision is that defendant's undertaking really consists of two distinct parts, a guarantee of the principal advanced, and a guarantee of the payment of compound interest. On the latter promise a right of action would accrue for each instalment of interest as it became due. *Hamilton v. Van Rensselaer*, 43 Barb. 117. It is hard to see why the guarantor's undertaking is any more separable into two parts than that of the party guaranteed. Yet if the latter's promise had been to repay the advance with simple interest at a stated rate, it appears he could not be held liable for interest after the principal had been barred by the statute. *Hollis v. Palmer*, 2 Bing. N. C. 713. It is at least fairly arguable, however, that where the interest is compound and each instalment as it accrues becomes a new principal, the rule should be different from that applied where the interest is simple.

TORTS — MALICIOUS INTERFERENCE WITH CONTRACTS — PLEADING. — The declaration alleged that the defendants induced one M. to break a contract with the plaintiff, by false and malicious statements made for the purpose of depriving the plaintiff of the benefits of his contract. On demurrer, *held*, that the declaration is insufficient for not setting out the false statements. *May v. Wood*, 51 N. E. R. 191 (Mass.). Three justices dissenting.

In an action for slander, the substance of the false statements must be set out in the declaration. *Newell, Slander and Libel*, 595 *et seq.* In the principal case the majority held that even in an action for maliciously inducing a person to break his contract, when false statements are alleged, they must be set forth in substance and proved. On the contrary, it is argued in the dissenting opinion that the gist of the action is the malicious injury without justifiable cause, by inducing a person to break a contract, and therefore that the statements used for that purpose are immaterial whether true or false. See 8 HARV. LAW REV. 1; *Lumley v. Gye*, 2 E. & B. 216; *Walker v. Cronin*, 107 Mass. 555. It seems evident, therefore, that although the case turned on a question of pleading, the point on which the court really divided was a question of substantive law, the majority regarding the false statements in the declaration as the gist of the action, and the minority, the malicious injury by inducing a person to break a contract. While the decision does not expressly impeach the doctrine of *Lumley v. Gye*, it clearly shows a disinclination to affirm it. See 11 HARVARD LAW REVIEW, 449.

TORTS — INTERFERENCE WITH BUSINESS — TRADES UNIONS. — Defendants, officers of a trade union, caused certain of their members to abandon the service of the plaintiff because he had not joined an association recognized by the defendants' society. *Held*, that this was tortious conduct, and the defendants should be enjoined from further interference. *Cooms v. Chrystee*, 53 N. Y. Supp. 668 (Sup. Ct., Spec. Term, N. Y. Co.).

The facts in this case are reported but briefly and insufficiently. It does not appear whether the workmen were caused to break a contract, or merely to exercise a right they had of leaving at any moment. If the former was the case, waiving the question of the form of remedy, the defendants' act was a tort, a contract right being a property right. *Lumley v. Gye*, 2 E. & B. 216. If the latter was true, service terminable at will not being a property right, the defendants, according to the doctrine of *Allen v. Flood*, [1898] App. Cas. 1, were liable only if the means used were unlawful — which does not appear to be the fact in this case. Before *Allen v. Flood*, *supra*, it was generally held that where one person intentionally caused pecuniary damage to another, a good cause of action was made out unless the former showed some ground of justification. *Mogul Steamship Co. v. McGregor*, [1892] App. Cas. 25. Competition was always regarded as a justification, and in the principal case there was competition, for the conflict between trades unions and employers is competition as much as is the struggle between individual parties for employment or trade. *Holmes, J.*, in *Vegetahn v. Gunter*, 167 Mass. 92.

TORTS — LANDLORD AND TENANT — OVERFLOWING CISTERN. — On an upper floor of certain premises defendant constructed a cistern, from which plaintiff, who afterwards became tenant of a lower floor, received water. Defendant used due care in employing a plumber to repair a leak in the cistern, but, through the negligence of the plumber, water escaped and damaged plaintiff's goods. *Held*, that plaintiff cannot recover. *Blake v. Woolf*, [1898] 2 Q. B. 426.

In *Rylands v. Fletcher*, L. R. 3 H. L. 360, the rule was laid down that "the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape." In every case since there has been a manifest inclination to discover some-

thing in the facts to take the case out of the rule. The court distinguish the principal case from *Rylands v. Fletcher*, *supra*, because here the injury resulted from a natural user of the land, while there it was caused by a non-natural user. This seems like drawing the line between a large reservoir and a small one. The court made another distinction between the cases, in that here, as the plaintiff became tenant after the cistern was constructed, and as he used water from it, he must be taken to have consented to its being on the premises. *Anderson v. Oppenheimer*, 5 Q. B. D. 602. The numerous exceptions have left but little of the original rule.

TORTS — LEGAL CAUSE. — Defendants were owners of a bridge which they negligently allowed to be in bad repair. The plaintiff in Maine was travelling for pleasure on Sunday, in violation of a statute of that State, and his horse was injured by a defect in the defendants' bridge. *Held*, that the plaintiff cannot recover. *Beacham v. Proprietors of Portsmouth Bridge*, 40 Atl. Rep. 1066 (N. H.).

The ground taken by the court is that the plaintiff's wrong necessarily contributed to the injury, the same doctrine having been held in *Cratty v. City of Bangor*, 57 Me. 423. *Lyons v. Desotelle*, 124 Mass. 387, *accord*. The weight of authority, however, is contrary, and it is generally held on a similar state of facts that the breach of the Sunday law is a mere condition under which the accident happens, rather than a contributing cause. *Sutton v. Town of Wauwatosa*, 29 Wis. 21. This view is certainly a more correct interpretation of the facts, for the accident would have been as likely to happen on any other day in the week. It is now provided by a recent Maine statute that the law against Sunday travelling shall not affect the right or remedy of a party arising from an injury received on that day.

TORTS — LORD CAMPBELL'S ACT — JURISDICTION. — Plaintiff's son, a subject of Belgium, being on the high seas, in a Belgian vessel, was killed in a collision caused by the negligent management of a steamship belonging to defendants. *Held*, that plaintiff has no right of action under Lord Campbell's Act. *Adam v. The British and Foreign Steamship Co.*, [1898] 2 Q. B. 430.

The question is largely, if not entirely, one of construction. For, admitting the power of Parliament to give a right of action for a cause arising outside the jurisdiction, a statute should not be construed thus to contravene the principles of international comity without the clearest language. For this reason the case is preferable to a prior contrary decision. *The Explorer*, L. R. 3 A. & E. 289. The American authorities agree that no action will lie under statutes similar to Lord Campbell's Act where the place of killing is outside the State. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465. Whether, under such circumstances, recovery may be had in a domestic forum under a foreign statute is a mooted question. *Dennick v. Central R. R. Co.*, 103 U. S. 11; *Ash v. Baltimore & Ohio R. R. Co.*, 72 Md. 144. Nothing in the principal case runs counter to the proposition that the statute applies for the benefit of aliens where the killing is within the jurisdiction. *Philpott v. Mo. Pac. Ry. Co.*, 85 Mo. 164. Upon the whole subject, see Tiffany, *Death by Wrongful Act*, §§ 195 *et seq.*

REVIEWS.

THE CONFLICT OF LAWS IN THE PROVINCE OF QUEBEC. By E. Lafleur. Montreal. C. Theoret. 1898. pp. xvi, 267.

This interesting book is the result of a course of lectures delivered by the author as Professor of International Law in McGill University. He treats of the law of the Province of Quebec alone; a law derived from the pre-Napoleonic French law, and found in the Provincial Codes in the decisions of the Provincial Courts, and in the decisions, on appeal from Quebec, of the Supreme Court of Canada and of the Privy Council. The author cites few authorities except such decisions and the commentaries of the French jurists, — a proper course, since "Conflict of Laws" is a branch of the municipal law, and decisions of a State where a different system of law prevails can be no safe guide to the law of Quebec. For the same reason, the Quebec decisions cannot be authoritative with us.

The treatise has, however, both a theoretical and a practical value to us. It is worth while to see how, in Quebec, a respect for precedent as great, apparently, as that of English lawyers affects a system of law based on the modern Civil Law. Continental law restrained by the doctrine of *stare decisis* seems to be preferable to Continental law *ferae naturae* as one finds it in the discordant writings of Savigny, Bouhier, and Pillet. The lawyer advising his client must have a happier life in Montreal than in Paris, since he has a guide in the decisions of the courts.

Even in a more practical sense this treatise is valuable to an American lawyer. The decisions of the Quebec courts, while not of authority with us, would on such questions be held in respect. The doctrines here stated are often identical with our own. There are, to be sure, some fundamental differences. Capacity to contract is determined, as in France, by the law of domicile, not as in this country (*Saul v. His Creditors*, 17 Mart. 596) by the *lex loci contractus*. The French rule, adopted by the Quebec Code, is an unfortunate one, resulting in an utter and hopeless want of unanimity among the authors as to its proper application. Another remarkable instance of difference is the recognition by the Quebec courts of foreign administrators, guardians, and even receivers. It must be confessed that in this respect the Quebec doctrine is in actual operation more satisfactory than ours.

The author's materials are well arranged, his exposition is clear, and his infrequent original suggestions are just and sound. J. H. B.

CASES ON CONSTITUTIONAL LAW. Edited by Carl Evans Boyd. Chicago: Callaghan & Co. 1898. pp. xi, 678.

The compiler of this book was right in thinking that a need is felt for a small collection of cases on constitutional law; but it cannot be said that the book satisfies the demand. The more a work of this nature is limited, the greater becomes the necessity for careful selection, arrangement, and annotation. Lacking any one of these requisites, a case-book is a failure. The work of selection, both in matter of the cases chosen and the extracts printed from them, is fairly well done. One omission only of any importance has been made,—in the matter of the power of Congress over the territories. On that subject only a short extract is printed from the *American Insurance Co. v. Canter*, p. 583, an extract wholly inadequate to suggest the difficult questions involved. This oversight is the more unfortunate because the authority is small in comparison with the importance of the subject, and could not, if all were printed, seriously increase the bulk of the book.

The general scheme of the topics is well conceived, and with some originality; but little skill is spent upon the arrangement of the cases under the headings. The author mainly follows Thayer's Cases in this regard, as he frankly admits in his preface. Where a change is made, it is generally for the worse. The strict adherence to chronology under Taxation leads to chaotic arrangement. The first case is *Hyllon v. United States*, p. 26, where we try to solve the question of a direct tax. We think we have settled the question, and pass to State taxes on the instruments of the federal government and on interstate commerce, federal taxes on instruments of State government, and State tonnage taxes. After this technical question we find buried here the one general case on the broad problems in regard to the legitimate objects of taxation, *Loan*

Association v. Topeka, p. 78; and the next two cases, pp. 85, 91, bring us back to considering what is a direct tax again.

The chief defect in the work is its meagre, and sometimes careless, annotation. The only satisfactory note is on the *Dred Scott* case, p. 489, where the situation is well explained by quotations from writers of eminence. It is only fair to say that after the case of *In re Neagle*, p. 337, a note of four lines refers to a case decided in 1897; and under the *Police Power*, to make up, perhaps for printing only two cases, the author gives a note of twenty lines, stating the substance of two cases and citing six others. Under *Interstate Commerce*, however, the subject which above all marks a fluctuation between opposing views, there is not a note from beginning to end, except three lines at the end of *Gibbons v. Ogden*, p. 172, to the effect that Chancellor Kent (whose opinion was overruled by the decision) had held differently, and that his reasons might be found in his commentaries. What notes there are, are carelessly compiled; most of the citations are simply those referred to in the opinions; and a case referred to in *Loan Association v. Topeka*, p. 81, which in the opinion could be cited only in manuscript because not yet regularly reported, is still referred to as "MS.," although it has now been reported for twenty-four years. *Lowell v. Boston*, 111 Mass. 454. Useful the book may be for beginning the study of constitutional law; but it is unfortunate that the work has not been better carried out.

J. G. P.

THE LAW OF BANKRUPTCY. By Wm. Miller Collier. Albany, N. Y.: Matthew Bender. 1898. pp. xxx, 536.

Primarily this treatise is a clear analysis of the United States Bankruptcy Act of 1898, and the arrangement of the chapters and the scheme of the sub-sections are partly determined by the form of the Act. Each section of the law is printed in full: there are references to former National Bankruptcy Acts and cross-references to the present Act. Following this is the commentary upon the section in topical paragraphs—over seven hundred in all. This form of treatment is most convenient for the practitioner. The appendix, containing certain forms from another hand, is now superseded by the official forms; but the abstract of State Exemption Laws in Appendix B is indispensable.

The study of bankruptcy consists mainly in construing the statutes. The permanent value of the author's work depends upon the accuracy of his forecast of the way in which the courts will construe the Act. In his interpretation of the law the author cites over five thousand cases bearing upon analogous provisions in other Acts, American and English: the chief stress is, of course, laid upon the judicial construction of the United States Bankruptcy Act of 1867, on which the present law is largely moulded. The author's comments are very uneven in value, but some are distinctly able. The fundamental chapter upon the creation and jurisdiction of the courts of bankruptcy is clear and practical throughout: but incidentally the discussion of the jurisdiction to determine the rights of lienors is hardly conclusive. p. 12. In the chapter concerning the adjudication of bankruptcy, the technical acts of bankruptcy are defined with much care, but the defence of solvency, which is one of the characterizing features of the new law, is dismissed too briefly. pp. 36-51. The treatment of exemptions is notably satisfac-

tory, pp. 70-79; but on the large subject of the rights and duties of trustees the comment is hardly adequate, though the citations are full. pp. 254-259. That is a curious slip in another section to speak of the moral obligation to pay a discharged debt as a good consideration for a new promise to pay it. p. 190. It is now well settled that the true effect of the subsequent promise is to waive the defence of the discharge. In the last pages of the treatise is considered an important question which must be much litigated in the first years of the new law — the effect of a national bankruptcy act in suspending state bankruptcy laws, state insolvency laws, and state laws regulating common law assignments. The author states the problem very well, but hardly solves it. pp. 427-431. A leading case upon this last question of common law assignments is not cited. *Boese v. King*, 108 U. S. 379. To be quite fair, the commentary is always a succinct guide to the cases, and upon the whole it succeeds oftener than it fails.

B. W.

THE LAW OF MINES IN CANADA. By Wm. David McPherson and John Murray Clark. Toronto: The Carswell Company, Limited. 1898. pp. lxi, 1294.

When the Dominion Government was formed each province had so far developed a mining law of its own that it was deemed inexpedient to try to bring them all under one uniform system. The result is that at the present day there are no less than six distinct bodies of statutory mining law in Canada. The object of the author has been to collect these numerous statutes of the different governments, and make their contents easy of access by printing them all in one volume with an index and elaborate cross-references. This work is supplemented by short historical sketches of the development of the mining law in the various provinces, by a full dictionary of mining terms, and by some two hundred and sixty pages devoted to the common law of mines. The volume is not a theoretical text-book, but is designed simply for purposes of reference. It is a work to which any one can turn and quickly find the section of the statute applicable to his case, the history of the statute, and the important cases decided on the point. The chapters on common law are eminently practical, composed for the most part of citations from authorities, so moulded together as to give a condensed and comprehensive view of the various legal points connected with the working of mines. The law is grouped under the heads of Contracts, Leases, Licenses, Water, Support, Ventilation, and the like. The many cases cited — the table contains about 1,300 of them — are mostly decided by English or Canadian courts; but the principles they stand for are equally applicable to this country, and the book will be an assistance to lawyers here in their search for collateral authority.

For miners, mine owners, and mining lawyers resident in Canada, however, the work is especially designed. For them, the common law chapters will be convenient for reference, and the collection of statutes will save much of the time hitherto spent in research. There is an undoubted place for the book. The rapid increase in importance of the mining industry in the different provinces, together with the multiplication of statutes, as the author well says, "has made a collected statement of the laws a matter of convenience amounting almost to a necessity."

G. B. H.

UGHT THE JUDICIARY OF MASSACHUSETTS TO BE ELECTIVE? By James W. Stillman. Boston: published by the author. 1898. pp. 17.

This pamphlet urges that the present system of appointing the Massachusetts judges for life be discontinued, and that the judicial office be made elective. The general argument is an application of the reasons which favor the popular election of legislative and executive officers to this totally different case. The position taken, if indeed it is destined to obtain any following, is to be regretted. Its fallacy is in the failure to realize that, however our system may succeed in the case of legislators, the people in general are not competent to decide upon the fitness of judges. In the appointment of judges, as in many other matters, the people must act through their delegates who are better qualified than they to appoint. The author ignores the danger of having a judge's tenure dependent upon political issues. He also ignores the necessity to a judge of a life of careful training, and the probable incompetence of an elected judge taken for a short term from active practice, who has had no opportunity to fit himself for the necessary general work. Massachusetts, surely, finds little inducement to follow the system which in Michigan resulted in the defeat of the late Judge Cooley and which in New York City has just resulted in the political victory of Richard Croker over one of the ablest New York judges, Judge Daly.

J. G. P.

BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

A TRUSTEE'S HANDBOOK. By Augustus Peabody Loring. Boston: Little, Brown, & Co. 1898.

CASES ON CONTRACTS. Vols. I. & II. By William A. Keener. New York: Baker, Voorhis, & Co. 1898.

CIVIL LIBERTY AS THE BASIS OF PRIVATE INTERNATIONAL LAW. By Manuel Azpiroz. Mexico, 1898.

FORMS OF PLEADING. Vol. I. By Austin Abbott. New York: Baker, Voorhis, & Co. 1898.

PRINCIPLES OF CONSTITUTIONAL LAW. By Thomas M. Cooley. Boston: Little, Brown, & Co. 1898.

SELECTED CASES ON THE LAW OF PROPERTY IN LAND. Edited by William A. Finch. New York: Baker, Voorhis, & Co. 1898.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By E. Parmelee Prentice and John G. Egan. Chicago: Callaghan & Co. 1898.

THE LAW OF MINES IN CANADA. By Wm. David McPherson and John Murray Clark. Toronto: The Carswell Company. 1898.

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CONSTITUTIONAL ASPECTS OF ANNEXATION.

PART FIRST.

I.

WHETHER a European power shall indulge the appetite for land is a question merely of ability and expediency. An Englishman, a Frenchman, a Russian, or a German would not presume to discuss the right of his government to seize land anywhere, hold it by any tenure, and rule it at will. For these governments, however unlike in structure and purpose, enjoy alike sovereignty in its elementary form. What the government wills, that it may do without considering the act or its consequences in the light of an organic law of binding obligation. The Federal Government is in a different position. Its powers are conferred, and duties and restraints are imposed upon it, by a written constitution interpreted by an independent judiciary.

Whether the United States shall annex Spanish lands now in their military possession, or within the immediate sweep of their military arm, demands a more searching examination of the powers, the duties, the purposes of our republic as marked by the Constitution than has any question arising since the Civil War.

II.

The United States have the power of expansion. Chief Justice Marshall says: "The Constitution confers absolutely on the gov-

ernment of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty."¹ A State may add to its domain by discovery and settlement, and the Supreme Court has recognized this method of acquisition as one approved by the law of nations;² though perhaps it may be approved more accurately as necessarily inferred from larger constitutional powers. Surely if a nation can buy or seize land it can find and keep land.

The power of expansion is illimitable in point of law. Whenever the President and Congress join in extending the sovereignty of the United States over a particular territory, their action must be respected by the courts without regard to its location. "Who is the sovereign *de jure* and *de facto* of a territory is not a judicial but a political question, the determination of which, by the legislative and executive departments of any government, conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."³

Is the power to annex conditioned upon the formation of States out of the new territory? This question is not suggested by the acquisition of small tracts for specific governmental uses, such as coaling stations, or of vacant guano islands under the Act of 1856.⁴ Nor can it be urged as a legal objection to annexation that the land in question is not to be annexed as a State, for the admission of a State is, like the selection of territory, a political matter beyond the competency of the courts. But, according to the spirit of the Constitution, the subjection of annexed territory to exclusive federal control is an abnormal and temporary stage necessarily preceding the normal and permanent condition of statehood. Chief Justice Marshall described the Territories as being "in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained."⁵ Chief Justice Taney said that the power to admit new States

¹ *American Ins. Co. v. Canter*, 1 Peters, 511, 541.

² *Jones v. United States*, 137 U. S. 202, 212; *Shively v. Bowlby*, 152 U. S. 1, 50.

³ *Jones v. United States*, 137 U. S. 202, 212.

⁴ U. S. Revised Statutes, § 5570.

⁵ *Loughborough v. Blake*, 5 Wheaton, 317, 324.

authorizes "the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission."¹ And Justice Gray said: "Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people and in trust for the several States to be ultimately created out of the Territory."²

All the land ceded to the United States by the States was transferred upon the understanding that it should be formed into States eventually. The Third Article of the Treaty of 1803, by which France ceded Louisiana, recites that "The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States. . . ." This article was construed by Chief Justice Marshall to mean "that Louisiana shall be admitted into the Union as soon as possible upon an equal footing with the other States;"³ and a like meaning is to be placed upon the Treaty of 1819, by which Spain ceded Florida, and the Treaties of 1848 and 1853, by which Mexico ceded California and New Mexico. Thus, with the exception of Texas, which was annexed by force of the joint resolution admitting it as a State, the vast domain gained by the United States down to 1853 was acquired in trust for States to be subsequently admitted.

The promise of statehood was not expressed in annexing Alaska and Hawaii, and the bearing of this departure from custom upon a pending project of annexation will be noted later.

III.

There is some difference of opinion as to the precise source of the power of the United States to govern territory outside the limits of States. Chief Justice Marshall said: "The power of governing and legislating for territory is the inevitable consequence of the right to hold territory. Could this proposition be contested,

¹ *Scott v. Sandford*, 19 Howard, 393, 447.

² *Shively v. Bowlby*, 152 U. S. 1, 57.

³ *New Orleans v. De Armas*, 9 Peters, 224, 235.

the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.'"¹ And he said in a later opinion: "In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

"Perhaps the power of governing a territory belonging to the United States which has not by becoming a State acquired the means of self-government may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory."²

In Chief Justice Taney's opinion the power to "make all needful rules," etc., refers solely to land ceded by the States and the general power to govern territory "stands firmly" on the right to acquire it,³ and this perhaps is the better because the simpler ground. But, to quote Chief Justice Marshall again, "Whatever may be the source from which the power is derived, the possession of it is unquestioned."⁴ And it should be added that the scope of the power must be the same, whichever its source.

The States of the Union are under the jurisdiction of two legislatures,—Congress and the State legislature each has its appropriate sphere of authority. The Territories are under the exclusive control of Congress, whose position is defined in the following opinions of the Supreme Court: "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the Territories, so long as they remain in a territorial condition."⁵ "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void

¹ *Serè v. Pitot*, 6 Cranch, 332, 336.

² *American Ins. Co. v. Canter*, 1 Peters, 511, 542.

³ *Scott v. Sandford*, 19 Howard, 393, 432-444.

⁴ *American Ins. Co. v. Canter*, 1 Peters, 511, 544.

⁵ *Shively v. Bowlby*, 152 U. S. 1, 48.

act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."¹ Although the difference between federal and local affairs is not marked in the Territories by governments organically distinct, as in the States, it exists nevertheless, for Congress stands in a double relation to each Territory, caring for its local interests as a State government might, and treating it as a part of the republic in matters of federal concern.

IV.

May Congress exert its power over territory within its jurisdiction and outside the limits of States without regard to the Constitution?

A desire to possess new lands, coupled with a fear lest the extension of the Constitution to some of them at least and their people would both prejudice our own interests and hamper our rule, has begotten the proposition that annexed territory not admitted as a State is not an integral part of the "United States" and need not be governed by the law of the Constitution.

Although this proposition is suggested by an assumed emergency, it would, if established, affect equally all territory without the limits of States, — Alaska, Arizona, Hawaii, New Mexico, Oklahoma, and the District of Columbia would lie beyond the pale of the Constitution, and therefore under the arbitrary control of Congress.

The popular authority in support of the proposition is a passage in a recent opinion of the Circuit Court of Appeals for the Ninth Circuit sustaining an Act of Congress forbidding the importation, manufacture, and sale of liquor in Alaska.² The Court says: —

"In support of the first ground of demurrer, it is contended that the law upon which the prosecution is based is unconstitutional, because, among other things, the government of the United States can exercise only those specific powers conferred upon it by the Constitution; that the Constitution guarantees to the citizens the right to own, hold, and acquire property, and makes no distinction as to the character of the property; that intoxicating liquors are property, and are subjects of exchange, barter, and traffic like any other commodity in which a right of property exists; that, inasmuch as the power to regulate commerce was

¹ *National Bank v. County of Yankton*, 101 U. S. 129, 133.

² *Endleman v. United States*, 57 U. S. App. 1, 86 Fed. Rep. 456, 458.

committed to Congress to relieve it from all restrictions, Congress cannot itself impose restrictions upon commerce by prohibiting the sale of a particular commodity; that if Congress has the power to regulate the sale of intoxicating liquors within the Territories as a police regulation, it can only enact laws applicable to all the Territories alike. The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well-established doctrine that the Territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control. *Benner v. Porter*, 9 How. 235, 242. The United States, having rightfully acquired the territory, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State. *Insurance Co. v. Canter*, 1 Pet. 511, 542; *Cross v. Harrison*, 16 How. 164, 193; *National Bank v. Yankton Co.*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U. S. 15, 44; *Mormon Church v. U. S.*, 136 U. S. 1, 42, 43; *McAllister v. U. S.* 141 U. S. 174, 181; *Shively v. Bowlby*, 152 U. S. 1, 48. Under this full and comprehensive authority, Congress has unquestionably the power to exclude intoxicating liquors from any or all of its Territories, or limit their sale under such regulations as it may prescribe. It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. Whether the subject elsewhere would be a matter of local police regulation, or within State control under some other power, it is immaterial to consider. In a Territory all the functions of government are within the legislative jurisdiction of Congress, and may be exercised through a local government or directly by such legislation as we have now under consideration."

This passage is to be read as an affirmation of the unquestionably broad and exclusive power of Congress in administering the Territories, but not of a right to deal arbitrarily with persons and property therein, for it will be shown that the Supreme Court recognizes the Territories as part of the United States for most important purposes, and confirms to their people the great constitutional guarantees.

The words "United States" in the Constitution may be construed in some cases to refer to the States alone. For example, territorial courts are not technically courts of the "United States."¹ Pre-

¹ *Benner v. Porter*, 9 Howard, 242.

sumably, however, the "United States" is, in the language of Chief Justice Marshall, "the name given to our great republic, which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania," and, he added, "it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one, than in the other."¹

The general and unqualified prohibitions imposed upon Congress are absolute denials of power without regard to place.

Said Chief Justice Taney in *Scott v. Sandford*:²—

"No one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

"Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

"So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation."

A quotation from the *Dred Scott* Case is apt to be discredited in many quarters because of resentment against the decision, but on

¹ *Loughborough v. Blake*, 5 Wheaton, 317.

² 19 Howard, 393, 450.

this point Justice Curtis concurred with the court in his dissenting opinion. He said of the power of Congress over Territories, "in common with all the other legislative powers, it finds limits in the express prohibitions on Congress not to do certain things; that in the exercise of the legislative power Congress cannot pass an *ex post facto* law or bill of attainder, and so in respect to each of the other prohibitions contained in the Constitution" (p. 614). And he agreed further that property within the Territories was protected by the Fifth Amendment (p. 624). More restrained in expression, but equally to the point, is Justice Bradley's opinion: "Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist, rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any other express and direct application of its provisions."¹

In another opinion of the Supreme Court we read, "Congress is supreme [over the Territories], and for the purposes of this department of its governmental authority has all the powers of the people of the United States except such as have been expressly or by implication reserved in the prohibitions of the Constitution."²

In *Thompson v. Utah*³ it is held, "That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question,"⁴ and further, "it is equally beyond question that the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States."⁵

In *Callan v. Wilson*⁶ a person convicted in the Police Court of the District of Columbia without the interposition of a jury was ordered to be discharged from custody, and the Court said (p. 550): "There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of the

¹ *Mormon Church v. United States*, 136 U. S. 1, 44.

² *National Bank v. County of Yankton*, 101 U. S. 129, 133.

³ 170 U. S. 343, 346.

⁴ See *American Pub. Co. v. Fisher*, 160 U. S. 464, 468; *Springville v. Thomas*, 166 U. S. 707.

⁵ See also *Reynolds v. United States*, 98 U. S. 145, 154.

⁶ 127 U. S. 540.

District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property, especially of the right of trial by jury in criminal cases. . . . We cannot think that the people of the District have, in that regard, less rights than those accorded to the people of the Territories of the United States."

What is the status of the inhabitants of territory lying within the United States, but without the States?

The Constitution provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." In the *Slaughterhouse Cases*¹ the Court said of this provision: "The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it; but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear then that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."

In a recent opinion the Supreme Court said: "The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of Indian tribes owing direct allegiance to their several tribes."²

We will consider next the status of persons residing within territory at the time of its annexation to the United States.

It is a rule of public law that a state by annexing territory becomes entitled to the allegiance of its people. In the words of Chief Justice Marshall, "The relations of the inhabitants with their for-

¹ 16 Wall. 36, 72.

² *United States v. Wong Kim Ark*, 169 U. S. 649, 653.

mer sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their territory transfers the allegiance of those who remain in it."¹ And the right to allegiance is quite as substantial where territory is annexed by conquest unconfirmed by treaty.²

There is no occasion for relaxing the rule when the identity of the ceding or conquered state is extinguished by the transfer of its entire territory. But when the land transferred is a part only of a national domain, a regard for the ties of nationality and a reluctance to claim an unwilling allegiance may lead the new sovereign to allow the inhabitants who wish to retain their old allegiance a suitable time within which they may settle their affairs and depart. This privilege of removal was accorded by the United States in the treaties by which they acquired Louisiana, Florida, California, and Alaska.

Are the inhabitants of the annexed territory whose allegiance is transferred to the United States citizens thereof?

The Sixth Article of the Treaty with Spain of 1819 reads: "The inhabitants of the territories which His Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."

This Article as construed by Chief Justice Marshall "admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."³ And he added: "It is unnecessary to inquire whether this is not their condition independent of stipulation." This inquiry is now pertinent. Does not the citizen or subject of a foreign State whose allegiance has been transferred to the United States, by the transfer of the territory of his residence, become a citizen of the United States, whether the transfer be consummated by cession or by conquest? In other words, is not every person from whom the United States claims full allegiance a citizen? The Supreme Court has not been required to decide this question, but it seems that one owing full allegiance to the United States, and being

¹ *American Ins. Co. v. Canter*, 1 Peters, 511, 542.

² See Hall, *International Law*, § 206; Dana's *Wheaton*, page 435, note.

³ *American Ins. Co. v. Canter*, 1 Peters, 511, 542.

therefore subject to all the duties and responsibilities of a citizen, should have a citizen's rights. There are now within the United States "citizens," "wards" (Indians), and "aliens." Is there room for "subjects" who will be burdened with duties without enjoying compensatory rights?

Citizens of the United States residing without the limits of States have not the constitutional right to be represented in Congress, which must nevertheless lay upon them the taxes required by the Constitution to be "uniform throughout the United States." Here is taxation without representation, — one of the major grievances of the American Colonies against Great Britain. In reply to the charge that the United States maintain a condition that the Colonies denounced, Chief Justice Marshall said: "The difference between requiring a continent with an immense population to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean and associated with it by no common feelings; and permitting the representatives of the American people under the restrictions of our constitution to tax a part of the society which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the territories, or which has voluntarily relinquished the right of representation and has adopted the whole body of Congress for its legitimate government, as is the case with the District, is too obvious not to present itself to the minds of all."¹

Not only are citizens not residing in States without a voice in federal affairs, they are without constitutional right to regulate their own. The entire sovereignty over territory outside of the States is vested in the Federal Government. This position has not been always conceded. It was questioned in the *Dred Scott Case*,² and Senator Douglas declared that the people of the Territories possessed sufficient "popular sovereignty" to decide for themselves whether slavery should exist within their respective communities. The doctrine of popular sovereignty in the Territories is incompatible with the fundamental conception of the Union of States, and is thoroughly discredited.³

¹ *Loughborough v. Blake*, 5 Wheaton, 317, 324.

² 19 Howard, 293; see especially Justice Campbell's opinion, page 501.

³ See *National Bank v. County of Yankton*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U. S. 15, 44; *Mormon Church v. United States*, 136 U. S. 1, 44.

The right of Congress to govern the Territories is formally opposed to the principle that governments "receive their just powers from the consent of the governed," but it is justified by reasons like those by which, as we have seen, Marshall justified taxation without representation. Although Congress cannot surrender its supremacy, it usually concedes as large a measure of home rule to the Territories as is expedient. In the language of Chief Justice Chase, "The theory upon which the various governments for portions of the United States have been organized has ever been that of leaving to the inhabitants all the power of self-government consistent with the supremacy and supervision of national authority and with certain fundamental principles established by Congress."¹ Alaska is an exception to the rule because of its meagre population. Indeed, many years elapsed before Congress found it advisable to constitute it a "civil and judicial district."

Upon reviewing the opinions of the Supreme Court, it is confidently affirmed that the political control of all territory of the United States outside of the States is vested absolutely in Congress, which may prescribe any form of government and grant or withhold political privileges to the people at discretion. But it is affirmed with equal confidence, because upon the same authority, that these Americans possess the same personal and property rights that the people of the States enjoy. In the language of the Supreme Court: "The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."²

Bearing in mind the distinction between political privileges and personal rights, we may comprehend the effective meaning of two comments made by distinguished jurists upon the constitutional provision empowering Congress "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." Chancellor Kent said: "It would seem, from these various congressional regulations of the territories belonging to the United States [Territorial Regulation Acts] that Congress have supreme power in the government of them, depend-

¹ *Clinton v. Englebrecht*, 13 Wall. 434, 441.

² *Murphy v. Ramsey*, 114 U. S. 15, 44.

ing on the exercise of their sound discretion. That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the Constitution of the United States. 'All admit,' said Chief Justice Marshall, 'the constitutionality of a territorial government.' But neither the District of Columbia, nor a territory, is a *state*, within the meaning of the Constitution, or entitled to claim the privileges secured to the members of the Union. This has been so adjudged by the Supreme Court. Nor will a writ of error or appeal lie from a territorial court to the Supreme Court, unless there be a special statute provision for the purpose. If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River, to the west of the Rocky Mountains, it would afford a subject of grave consideration, what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent states; and in the mean time, upon the doctrine taught by the acts of Congress, and even by the judicial decisions of the Supreme Court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all proconsular governments have had, to abuse and oppression."¹ And Judge Story said: "The power of Congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled."²

If these comments have as broad a meaning as can be inferred from their texts, they are discredited by the opinions of the Supreme Court. But the suggestion that a bald despotism is

¹ Commentaries, i. 385.

² Commentaries, Section 1328.

possible in any part of the republic should not be imputed to the great commentators. Their comments should be considered together because Story's refers by a note to Kent's, and they may be construed to affirm simply the plenary power of Congress in the political administration of the Territories. Neither Kent nor Story can be fairly quoted as denying personal and civil rights to any of the American people. And we refer to these rights only when we assert that the general guarantees and prohibitions of the Constitution are as broad as the republic — not allowing to people living without the States any political franchise, any right of self-government, but assuring to them the rights of life, liberty, and property as they are defined by the Constitution.

PART SECOND.

The foregoing remarks on the constitutional aspects of annexation bear generally upon the several territorial questions growing out of the war with Spain, and especially upon the question of the Philippines.

I.

The United States are, as their name implies, a Union of States, and although in contemplation of law they may add to their domain without restriction as to place, each annexation should have for its object, be it near or remote, the creation of self-supporting and mutually supporting commonwealths. This conception of the republic as a union of States is consistent with the nationality of the American people, and it must be maintained if we are to contemplate free institutions throughout our land, for statehood is the single and conclusive mark of the ability of communities to govern themselves.

The United States, therefore, ought not to annex a country evidently and to all appearances irredeemably unfit for statehood because of the character of its people and where the climatic conditions forbid the hope that Americans will migrate to it in sufficient numbers to elevate its social conditions and ultimately justify its admission as a State. And when a project for annexing territory is coupled with a disclaimer of any intention of admitting it as a State now or hereafter, when this disclaimer is necessary in order to secure a favorable consideration, the project is opposed to the spirit of the Constitution.

The Philippine islanders are, and are likely to remain, unfit for statehood. Indeed, their inferior estate is admitted by the plea that we should embrace them because they are not fit even to govern themselves. Nor can we look forward to the peopling of the islands by Americans, for, whatever may be meant by the warning that "our frontiers are gone," and that we must provide land for "surplus population," the Philippines offer no inducements to American home-seekers. But it is argued that the Philippine project is in line with previous annexations which commit us to the proposition that statehood is not the necessary objective of annexed territory. This argument is worthless, and its illustrations are unimportant.

It is true that New Mexico and Arizona are not yet States, but the anticipation of statehood in which their domain was acquired will one day be realized. The purchase of Alaska was theoretically a deliberate departure from a sound rule, but it was in line with a policy approving the withdrawal of European sovereignty from America, and, after all, the republic is not actually prejudiced by holding a sparsely peopled territory that will probably become a veritable waste when the fur-bearing animals are exterminated and the gold is carried away. The acquisition of Hawaii was precipitated by the very war that has provoked the Philippine project, to which it is too closely related to serve as a precedent; and, besides, the citizens in Hawaii may yet acquire a constitutional right of self-government by the incorporation of the islands with a Pacific State. As for the guano islet of Navassa, which appertains to the United States, we may decline to perceive a likeness between lighting on a vacant manure heap and seizing one of the greatest of archipelagoes.

II.

The disclaimer of any intention of carving new States out of the Philippines, whatever it may be worth, is not sufficient to render annexation palatable. It is supplemented by the announcement that the Constitution covers the States only, and that the Philippines can be ruled with a free hand.

A readiness to rule the Philippines arbitrarily is an unseemly feature of the annexation programme, not mitigated by the promise that justice and mercy will temper force. It will be recalled that a strong objection to the original Constitution was the lack of a Bill of Rights, and that the omission was rectified by the adoption of the first ten amendments. Can it be said that these amendments are

superfluous or that the barriers we built for self-protection are not needed for the protection of Asiatics? Perhaps some of the amendments would be inappropriate in Asia, but we cannot pick and choose among them. Perhaps constitutional government in the Philippines would be a failure, but if Asiatics can be ruled only by a system which places their lives, liberties, and property at the disposition of the government, the work is unrepugnant and not in our line.

I have shown that the opinions of the Supreme Court affirm the proposition that the Territories are within the purview of the Constitution, and this will be the position of the Philippines if they are annexed, for they cannot be acquired in a way that will differentiate them organically from our present possessions. The domain of our republic is divided into two primary classes only,—land subject to the jurisdiction of States and land not so subject. Congress may divide its possessions into political districts, but it cannot extend the Constitution to or withhold it from each district at pleasure. The Constitution is not at the disposition of Congress. It is superior to Congress. It is a self-extending law, and so far as it covers our present possessions must cover future ones. The proposition has an important bearing upon a commercial policy in respect of the islands and upon the status of the islanders.

It is asserted that having annexed the Philippines we would not be obliged to treat them as commercially a part of the United States, but could, for example, prescribe special customs regulations for them. Indeed, we hear the prediction that we would open the islands to the world's trade and help Great Britain open the door to China. So far as the assertion claims the support of law, it appears to rest upon the following passage from Chief Justice Taney's opinion in *Fleming v. Page*.¹ The Chief Justice after deciding that a port in the belligerent occupation of the United States is a foreign port in respect of our tariff laws said:—

“This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided

¹ 9 Howard, 603, 616.

by the Treasury Department that goods imported from Pensacola before an Act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by Act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by Act of Congress.

"The principle thus adopted and acted upon by the executive department of the government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by Act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States."

Conceding the highest authority and the widest significance to this passage, it contemplates merely a transitory condition, — a period between the passing of an old régime and the complete establishment of a new one under the auspices of Congress, during which administrative authority is perforce supreme. In these circumstances the President may levy customs duties in the

annexed territory, and we grant, for the sake of argument, that he may levy them at discretion. We will assume, for the sake of argument, that duties may be collected on goods brought hither from the new territory. But these actions are abnormal and provisional. They rest wholly upon the inaction of Congress. Of course Congress cannot be compelled to organize customs districts in new territory, and delay may be inevitable as, for example, when land is annexed at a special session of the Senate. Nor is Congress necessarily neglectful in extending tariff laws deliberately. But, making allowance for unimportant delays, it will appear that Congress is obliged by the letter and spirit of the Constitution to impose uniform duties within the political limits of the United States. They who would annex the Philippines in the hope that the islands will continue to be commercially separate from the United States prefigure a wilful and persistent neglect of duty on the part of Congress, and in consequence of this neglect the permanent regulation of Philippine customs by the President. Congress would not long permit the President to levy duties at his pleasure within territory subject to its proper jurisdiction.

Unless Chief Justice Marshall has erred profoundly, Congress could not adopt a customs policy peculiar to the Philippines, for in *Loughborough v. Blake*,¹ he said with regard to the declaration in the Constitution that "all duties, imposts, and excises shall be uniform throughout the United States," "The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other," and again (page 325), "The Constitution not only allows, but enjoins the government to extend the ordinary revenue system to this district" (of Columbia).

Loughborough v. Blake affirmed the power of Congress to levy a direct tax within the District of Columbia, but the opinion contains a masterly declaration of the great principle that all the territory within the jurisdiction of Congress is commercially one country.

Should the courts affirm that all persons owing full allegiance to the United States are citizens thereof, the annexation of the Philippines would naturalize collectively all islanders answering to this

¹ 5 Wheaton, 317.

description. Certainly all islanders born after annexation and within the allegiance of the United States would be citizens. (See case of Wong Kim Ark, *ante*, page 299.)

The opinion in the case of Wong Kim Ark¹ excepts from the rule of citizenship by birth Indians "owing direct allegiance to their several tribes." In *Elk v. Wilkins*² the Court said: "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was decided in this case that an Indian does not become a citizen by living apart from his tribe, but can gain citizenship only through naturalization.

The segregation of tribal Indians from the body of the American people is an established feature of our polity. In the words of Justice Miller, "they always have been regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations."³

If we should annex the Philippines, it may be assumed that we would classify as many of the islanders as possible under the head of "wards," "dependent nations," or "tribal Indians." But this classification could not be made arbitrarily, for the constitutionality of our discrimination against the Indian is based on the fact that he owes allegiance to a political organization other than though inferior to the United States. Hence we could apply our Indian policy in the Philippines only to persons who have not been in fact within the jurisdiction of Spain, but have been governed by their tribal organizations.

After many of the islanders had been relegated to the condition of undesirable, troublesome, and expensive "wards," there would remain probably several millions whose claims to citizenship by

¹ 169 U. S. 649, 653.

² 112 U. S. 94, 102.

³ *United States v. Kagama*, 118 U. S. 371, 381.

allegiance might not be rejected, and whose children would be unquestionably citizens of the United States.

Among the rights incident to citizenship is that of moving freely throughout the length and breadth of the United States. Whether Malays would be induced to come here in sufficient numbers to lower the rate of wages in any part of the country, I do not discuss. But citizens have the right to compete with other citizens, and employers will go far for cheap labor.

Although citizens of the United States have not as such the right to vote, they may gain a residence in any State, and cannot be refused the suffrage therein on account of "race, color, or previous condition of servitude."

III.

May the United States assume permanent sovereignty over the Philippines without annexing them; that is to say, without making them a part of the republic? If this be lawful, our government may rule the islands unembarrassed by certain constitutional limitations and requirements that affect it within the United States, and inaugurate a provincial system capable of indefinite extension.

Although the question suggests a federal power over territory beyond the United States, the power itself must be derived from the Constitution.

The question cannot be answered by referring to the power to make treaties, for these are not extra-constitutional agreements. They are a part of the law of the land, and quite as subordinate to the Constitution as are acts of Congress, with which they rank in point of internal obligation.

The "general welfare" clause, that playground of lax constructionists, is ineffective, for it is "the general welfare of the United States," not the Philippines or Thibet or other outlying country. Equally ineffective is the power of Congress "to make all needful rules and regulations respecting the territory or other property of the United States," for whatever may be the precise meaning of this clause it contains no warrant for the ruling of provinces. The truth is that the territorial jurisdiction of Congress cannot be extended beyond the bounds of the republic for which only it is empowered to legislate and in which the Constitution is supreme.

There is but one constitutional power that affords an excuse for discussing the question, and that is the power exerted in declaring

war, which gives the President a roving commission to invade and hold enemy country.

In *Fleming v. Page*,¹ the power to make war and the character of belligerent occupation were carefully considered. Chief Justice Taney said: "A war . . . declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

"It is true that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

"But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of

¹ 9 Howard, 603, 615.

Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it."

A provisional control assumed by the President during a belligerent occupation may last until the end of the war, and if the territory does not then revert to its former sovereign, may be prolonged until a normal government shall be established.

This provisional control may continue by the sufferance of Congress after the territory has been annexed to the United States. For example, Congress never organized a government for California, but permitted the government instituted by the President during our hostile occupation to continue after the cession of the territory and until the State of California was admitted. The Supreme Court said in this relation:—

"The government of which Colonel Mason was the executive had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the

restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it was legislatively changed. No presumption of a contrary intention can be made."¹ It should be noted that whatever may have been the position of California during the belligerent period of the provisional government, the country became a part of the United States upon its annexation and was thenceforth within the purview of the Constitution.

There is but one way to rule the Philippines without annexing them, and that is by the authority of the President. In case the United States do not annex the islands by treaty their forces will nevertheless remain in possession after the passing of Spanish sovereignty. Our possession will be exclusive against the world. Internationally the Philippines will be United States territory, but something will remain to be done before they become domesticated — Congress must legislate for them. When this is done the country will be a part of the United States because it has come under their normal sovereignty. Until this is done the President will hold and control the islands in the absence of obstructive legislation by Congress. In these circumstances he may withdraw the forces and leave the country to its fate; recognize a local government; make a disposition of the islands by diplomatic arrangement or, with the consent of the Senate, by treaty; or continue his rule. He will be the arbiter of the Philippines by virtue of a possession begun under the authority of Congress and continued by its sufferance. In describing his powers as despotic I do not mean that they would be exerted with unnecessary severity, but simply that they would not be restrained by any law to which the islanders might appeal. (Whether, or how far Congress could guide the President's action in the Philippines by legislation directed to him or his American subordinates I do not discuss.) Here is provincial government and it may last during the forbearance of Congress. Such a government is only reconcilable with the principles of the Constitution as a temporary arrangement made advisable by the results of war.

We cannot extricate ourselves from the Philippine entanglement with credit by simply withdrawing our forces. Our operations in

¹ *Cross v. Harrison*, 16 Howard, 164, 193.

Luzon have given the *coup de grâce* to the old order without perfecting a new one, and while we are not called upon to insure the peace of the islands, we are morally persuaded to exert our influence towards bettering their condition.

If the difficulties in the way seem to be insurmountable, it is only because they lie in a field of international action, in which, fortunately, we have not had much experience. Hitherto the United States have displayed little concern in the "control, disposition, and government" of foreign territory, though they have proclaimed and enforced the Monroe doctrine for the protection of American States. But the European Powers have made the minding of other people's business a matter of unremitting attention and frequent experiment. Many of their actions in this regard are forbidden to us by constitutional or moral considerations; none perhaps would serve as a model for our precise imitation; but they suggest that there is an opportunity to do justice to the Philippines and promote our commercial interests in the East without annexing the islands or ruling them as provinces in derogation of our republican principles.

I am sufficiently impressed with the power of my country in regard to the Philippines to believe that any disposition of them that it would be likely to commend would be tolerated if not approved by the Maritime Powers. Nor would their toleration be due alone to respect for the United States. I think that in our eyes the Philippines are magnified beyond their true proportions on the political map of the world. Rich as these islands may be, important as is their strategic position, the aggressive Powers are pre-empting or seizing richer lands and better vantage-grounds with no more serious consequences as yet than "strained relations" or "demonstrations."

An acceptable solution of the Philippine problem might be achieved by pursuing one of the following courses: —

I. Neutralize the Philippines and recognize a local government. Accord recognition upon conditions that will afford due protection to foreign interests, including perhaps the institution of an international court, as in Egypt, and foreign supervision of the customs, as in China, or even of fiscal matters generally, as in Egypt.

II. Neutralize the Philippines and either establish a government on somewhat the same lines as the Congo Free State, or transfer them to an unobtrusive but competent state, like Holland.

III. Recognize the titular sovereignty of Spain over the islands, but transfer their entire administration to another Power. Such is the situation of Cyprus and Bosnia, which, nominally Turkish, are fully governed by Great Britain and Austria respectively.

IV. Transfer the Philippines to any Power that can be reasonably expected to rule them wisely and humanely and open them to the world.

These courses do not exhaust the possibilities but rather suggest them; and a practicable disposition of the Philippines other than their annexation to the United States will reward a determined effort to accomplish it.

Upon the assumption that the pending Treaty of Paris provides for the cession of the Philippines, it is asserted that we are so deeply committed to annexation that further opposition would be unbecoming, if not unpatriotic. This assertion belittles the greatest of all the powers especially confided to the Senate. There is a courteous presumption in favor of a treaty presented to the Senate, but nothing more. A treaty of peace that cannot be amended by the Senate without danger of reopening hostilities has of course a peculiar claim to ratification. The Treaty of Paris is not in this category. Nor is it a document chiefly of international concern intended to promote the renewal of friendly relations between the United States and Spain. Assuming that the annexation of the Philippines is embodied in the treaty, it is the most questionable project of domestic concern that a President has ever submitted to the Senate.

Carman F. Randolph.

MORRISTOWN, NEW JERSEY, *December 11, 1898.*

MASSACHUSETTS AS A PHILANTHROPIC ROBBER.

THE growth of government interference and the increasing tendency of its citizens to look to the State for aid rather than to their individual efforts are phases of modern social and economic life in the United States which for some years have occupied the thoughts of students of law and politics. Comment has often been made of late that the tariff laws, silver legislation, pension acts, and anti-trust laws are all signs of this one tendency. The increase of State legislation compelling individuals practising particular trades or professions — such as boiler engineers, doctors, barbers, plumbers, manufacturers of and workers on clothing or tobacco, horseshoers, and others — to be registered, licensed, or appointed by the State is but another sign of the same tendency; and so too are the laws passed ostensibly under what is called the “police power” by which the government has taken charge of private business, and which regulate minutely the manner in which an individual shall run his factory or his mine, pay his employees, build his buildings, manufacture his goods, etc.

One phase, however, of this increasing demand by the citizens that the State shall support them has not hitherto been noticed; and it is with the hope of calling attention to a new subject that this paper is written. While the facts here presented are taken from the statute books of Massachusetts alone, it is believed the new development of State aid described is not confined to any one State.

In the back portion of the volume issued annually by the Commonwealth of Massachusetts, and known, popularly as the “Blue Book,” technically as the “Acts and Resolves passed by the General Court of Massachusetts in the Year —,” will be found that form of legislation known as the “Resolves.”

Few of the citizens of the State are probably aware that through the medium of these “Resolves” the various Legislatures of Massachusetts since 1872, and especially since 1885, have appropriated as absolute gratuities, and awarded to private individuals as pure gifts, sums of money amounting to hundreds of thousands of

dollars.¹ Examination of the "Resolves" since the year 1872 shows that these appropriations of the public money for private benefit may be divided into three important classes.

The first great branch of State gratuities consists of gifts in the nature of pensions.

The State Legislature has not as yet established by statute any civil pension list; and yet it will probably surprise most citizens to know that there are four kinds of direct real civil pensions now given by the Commonwealth: —

First. In 1892 a man who was injured while defending property of the State at the Cooper Street riot, in 1863, succeeded in persuading the Legislature to grant him an annuity of \$100,² which was later increased to \$200,³ and upon his decease became an annuity for life to his widow.⁴

Second. In 1887 an annuity of \$200 was granted to "the last of the Hassanamisco Indians";⁵ but later apparently other Hassanamisco Indians turned up, for from 1895 to 1898 the State gives annuities of \$250 and \$300 to such Indians;⁶ and since 1890 a regular sum of \$150 has been paid to A. B. "in consideration of his care of his late mother and aunt, who were members of the Ponkapog tribe of Indians, and were formerly beneficiaries of the Commonwealth."⁷

Third. For a long time annuities have been paid in a number of cases to injured employees of the State, or to the widow and children of certain employees killed while in the employ of the Commonwealth, notably to those killed or injured at the Hoosac Tunnel "from an explosion of glycerine which had been carelessly left by employees of the Commonwealth." These have been three, five, and ten year annuities, renewed as they expired in sums varying from one hundred to two hundred dollars per year.⁸

¹ See table at end.

² Resolves 1892, ch. 53. (During the remainder of this article where Resolves are cited, merely the year and the chapter will be given. It is to be understood that all such citations refer to Resolves.)

³ 1894, ch. 24.

⁴ 1895, ch. 8; 1896, ch. 10.

⁵ 1887, ch. 32.

⁶ 1895, ch. 44 (\$200); 1896, ch. 28 (\$300); 1897, ch. 96 (\$200 and \$250); 1898, ch. 11 (\$200 and \$250).

⁷ 1890, ch. 13; 1891, ch. 89; 1893, ch. 17; 1895, ch. 7; 1897, ch. 5; 1898, ch. 10.

⁸ 1882, ch. 39, 40; 1883, ch. 24, 25; 1885, ch. 22, 49; 1886, ch. 29; 1887, ch. 3, 11; 1888, ch. 10, 21, 53; 1889, ch. 39; 1895, ch. 5; 1891, ch. 145; 1892, ch. 11, 102; 1893, ch. 5, 13; 1894, ch. 11; 1896, ch. 8; 1898, ch. 42. And see instances cited later.

Fourth. Employees of the State who have become too old or incapacitated for work have been granted yearly pay.¹

But in addition to these there has grown up within recent years a process of taking public money for private uses under the guise of charity, which has resulted in what is practically an indirect quasi-pension list. This form of gratuity takes the shape of gifts of salaries of deceased servants of the State or of a city to their relatives. As all these gifts are probably illegal and unconstitutional, the great increase of them becomes a question for serious consideration on the part of citizens and taxpayers.

In the year 1879, apparently for the first time, the Legislature began the practice of granting to a widow of a member of the Legislature who died while in office the balance of the salary to which he would have been entitled had he lived to the end of the term.² From this beginning, the Legislatures have now developed the practice to such extent that such balance of salary is granted, not only to the widow, but to almost any dependent relative, not only of Legislators, but of any servant of the State, from the Governor down to a page in the Legislature, or to the lowest clerk in one of the departments.

Thus, since 1879, the balance of the salary of a deceased member of the Legislature has been granted to his widow or executor or administrator twenty times.³ The balance of salary has been granted to a daughter, to other children, to the mother, and even to an aunt of a Representative.⁴

To the widow of a member the Legislature has granted, not only the salary he would have earned, but also "certain expenses incident to his sudden death."⁵

It has presented to a member elect to the Legislature who did not qualify "the amount due him had he qualified and served as Representative,"⁶ and to the child of a member-elect who had never taken his seat, his prospective salary.⁷

¹ 1886, ch. 4; 1895, ch. 115; 1896, ch. 105; 1897, ch. 38.

² 1879, ch. 2 (\$500).

³ 1880, ch. 58 (\$500); 1881, ch. 14 (\$532.20); ch. 30 (\$515); ch. 31 (\$501.60); 1883, ch. 57; 1885, ch. 79 (\$661); 1884, ch. 73 (\$481); 1886, ch. 80 (\$756); 1887, ch. 107 (\$240); 1888, ch. 61 (\$757); 1890, ch. 7 (\$751); 1890, ch. 79 (\$252); 1892, ch. 106; 1893, ch. 28 (\$770); 1893, ch. 29 (\$759); 1894, ch. 55 (\$860); 1894, ch. 15 (\$880); 1895, ch. 120 (\$700); 1895, ch. 117 (\$790); 1897, ch. 14 (\$750).

⁴ 1895, ch. 115 (\$820); 1897, ch. 4 (\$750); 1894, ch. 4 (\$760); 1898, ch. 41 (\$750); 1894, ch. 38 (\$750).

⁵ 1894, ch. 82 (\$756 and \$16).

⁶ 1889, ch. 107 (\$750).

⁷ 1884, ch. 79 (\$650).

Then, broadening the practice, the Legislature has granted the balance of salary due, had the officer served, to the widow of a Governor, to the widow of a member of the Governor's Council, and even to the widow of a councillor-elect, who had not served at all, his full prospective salary; to the widow of a judge of the Supreme or Superior Court; to the widow or family of a judge of the Probate Court; to the widow of a judge of a Municipal Court in Boston;¹ of an assistant register of probate; of the controller of county accounts; of the superintendent of the Massachusetts Reformatory; and of bank, insurance, and railroad commissioners.²

From officials of the State, the Legislature has extended its gifts to relatives of clerks and minor officials: thus to the widows of clerks in offices of Commissioner of State Aid, State Board of Agriculture, and other departments at the State House;³ to the widow of a clerk of the Senate;⁴ to the mother of a register of labor in the Civil Service Commissioner's office,⁵ and even to a brother of a page in the House of Representatives,⁶ and to the brothers of an employee in the office of Sergeant-at-Arms,⁷ and to the widows of messengers in the office of Secretary of State, and elsewhere,⁸ and to the widow of a fireman at the State House.⁹

It has not only paid unearned salaries, but also "expenses incurred on account of the last sickness and burial of Z. Y., an employee of the Commonwealth, such sickness having been contracted while in the service of the Commonwealth."¹⁰

It has taken even further paternal care of its employees, by voting to pay six hundred dollars for the funeral expenses of a messenger at the State House, and "all expenses incurred in the search for his person since his disappearance and the reward for information concerning him";¹¹ and it has even voted to pay not only the balance of salary to which a man would have been entitled had he

¹ 1896, ch. 67 (\$6559.14); 1894, ch. 5 (\$187.10); 1897, ch. 68 (\$525); 1893, ch. 3 (\$800); 1888, ch. 56 (\$4384.32); 1891, ch. 113 (\$3433.33); 1891, ch. 47 (\$4099.47); 1891, ch. 22 (\$4323.66); 1892, ch. 25 (\$2056.45); 1894, ch. 30 (\$5193.55); 1895, ch. 75 (\$1376.25); 1889, ch. 37 (\$1646); 1894, ch. 16 (\$1225); 1896, ch. 7 (\$2883.38); 1893, ch. 110 (\$1636).

² 1893, ch. 85 (\$2076.67); 1895, ch. 76 (\$423.37); 1893, ch. 3 (\$397.72); 1887, ch. 80 (\$1750); 1891, ch. 57 (\$1173.39); 1896, ch. 4 (\$1627.69); 1897, ch. 62 (\$534.73).

³ 1888, ch. 65 (\$697.22); 1883, ch. 3 (\$535.48); 1893, ch. 4 (\$1122.58); 1894, ch. 9 (\$408.06); 1894, ch. 23 (\$1466.67).

⁴ 1886, ch. 47 (\$2100).

⁵ 1884, ch. 80 (\$312).

⁶ 1889, ch. 66 (\$657.50); 1895, ch. 78 (\$1761).

⁷ 1893, ch. 10 (\$250).

⁸ 1896, ch. 29 (\$1860.22).

⁹ 1898, ch. 119 (\$240).

¹⁰ 1897, ch. 3 (\$58.06).

¹¹ 1892, ch. 80 (\$600).

lived to the end of the year, but a further salary or grant to the administratrix of the estate of a certain official who died towards the end of 1893, of the sum of \$625, "being three months' salary from the date of his death."¹

Nor has the Legislature confined its generosity to cases of death. It has made direct gifts of the money from the public treasury to living persons. It has given to a clerk in the office of Province Laws Commission her "loss of pay while disabled by sickness brought on by overwork."² A most flagrant case is one of a grant to a clerk in the office of the Tax Commissioner who resigned from ill health, "in recognition of his long and faithful service \$1000."³ And it has several times made grants of permission to clerks in departments at the State House who resigned from illness or incapacity, to be kept upon the pay roll for successive years, or of their salary to the end of the year.⁴

These last cases of payments made to living persons are simply the indirect establishment by the Legislature of a civil pension list without the passage of any statute.

But the Legislature has not stopped at this point in making presents of the public moneys to individuals. In 1888, apparently relatives of city officials began to see how easily State employees were acquiring presents from the State, and to ask themselves why a State employee should be more entitled to unearned salaries than a city servant. From 1872 to 1888 there is no record of authority being granted by the Legislature to cities to pay to city officials the balance of salaries to which they would have been entitled if they had lived to the end of the year. In 1888 the Legislature began this practice through special statutes, at first giving cities authority to pay such balances of salary only to high officials, and gradually broadening out until, in 1897, relatives of employees in the Street Department, and of policemen, secured these gratuities from the city by kindness of the Legislature.

To show the increase of this quasi-pension legislation, in 1888 the Legislature granted the city of Boston right to pay the balance of his salary to the widow of the principal assessor. In 1889 there was one such grant; in 1890, none; in 1891, two; in 1892, one; in 1893, three, one of them being to the orphan sisters of a probation officer; in 1894, three; in 1895, two; in 1896, one; in 1897,

¹ 1894, ch. 25.

² 1889, ch. 98 (\$450).

³ 1896, ch. 116.

⁴ 1886 ch. 4 (\$1200); 1890, ch. 115 (\$1100); 1896, ch. 105 (\$600); 1897, ch. 38 (\$600); 1889, ch. 53 (\$1591.40); 1891, ch. 6 (\$456.99); 1894, ch. 93 (\$1000).

seven; in 1898, ten, including payments to children, father, sister, and widow of employees in various departments.¹

As far as can be ascertained, the servants of no other city besides Boston have as yet taken advantage of the generosity of the Legislature; but if this practice of allowing cities to make presents of unearned salaries is to continue, undoubtedly officials of other cities will wake up to the chances thus offered.

The Legislature has not even stopped at city officials; it has begun to authorize counties to make these gifts. Thus, in 1891, the county of Plymouth was authorized to pay the balance of the salary of a deceased district court justice.²

The practice of paying these quasi-pensions has become so prevalent, and the pension idea has so infected the public mind, that it may seem a bold thing to attack the custom.

No amount of precedent, however, can excuse or legalize a wrong. And these payments are clearly a wrong and an injustice to the general taxpayer.

Upon first thought, the payment of the salary which an official or an employee would have earned may seem to be a kind, gracious, and benevolent act. But on the same line of reasoning any present of money to any deserving individual could be justified. If government is not to become tyranny, the cardinal principle of good government must be observed, — equal rights to all men; special privileges to none. And this maxim denies special privileges equally to the deserving and to the undeserving.

If the constitutionality of these resolves granting special payments of unearned salaries to living officials or to relations of deceased official servants should be tested in the courts, there seems to be little question but that the courts would immediately declare them illegal.

For instance, in 1891, the question arose whether the State could authorize the city of Brockton to build a city hall partly for the use of the city and partly for the use of the G. A. R., and it was held by the court in *Kingman v. Brockton*³ that it could not.

“If a city or town may be authorized to give such assistance to a body of persons who have been soldiers or sailors in the war, the same principle

¹ Acts of 1888, ch. 78; Acts of 1889, ch. 329; Acts of 1891, ch. 50, 53; Acts of 1892, ch. 52; Acts of 1893, ch. 42, 44, 162; Acts of 1894, ch. 89, 90, 252; Acts of 1895, ch. 253, 254; Acts of 1896, ch. 256; Acts of 1897, ch. 157, 158, 203, 429, 455, 494, 514; Acts of 1898, ch. 87, 88, 99, 105, 111, 341, 347, 430, 446, 534.

² Resolve, 1891, ch. 44.

³ 153 Mass. 258.

would seem to extend so far as to include those who have rendered other great and meritorious services, and thus are entitled to public gratitude, — such, for example, as societies of disabled or past firemen or policemen. *If once the principle is adopted that a city or town may be authorised to raise money by taxation for conferring benefits on individuals merely because in the past they have rendered important and valuable services for the benefit of the general public, occasions will not be wanting which will appeal strongly to the popular sense of gratitude, or to the popular emotion; and the interests and just rights of minorities will be in danger of being disregarded.* If the body of persons to be benefited is numerous, the greater is the influence that may probably be brought to bear to secure such an appropriation of the public money."

So, too, in 1885, there was a question whether the State could authorize a town to pay a bounty to soldiers of the Civil War who had enlisted without any promise on the part of the town at the time of enlistment to pay them bounties, and when the town could not then legally pay bounties. The Court held that it could not, saying, in *Mead v. Acton*: —¹

"The bounty to be paid cannot be regarded in the light of compensation for services rendered; for their services as soldiers were not rendered to the town, and the town had nothing to do with their compensation. The war has been over for many years, and the payment of these bounties cannot encourage enlistments, or in any way affect the public service or promote the public welfare. *The direct primary object is to benefit individuals, and not the public. In any view we can take of the statute, the payments it contemplates are mere gratuities or gifts to individuals. The principle would be the same if a town should vote a gratuity or a pension to one who had rendered services as an officer or was in any way entitled to its gratitude. This a town has not the power to do, even with the sanction of the Legislature.* A statute conferring such power is unconstitutional, because it authorizes raising money by taxation for the exclusive benefit of particular individuals, and appropriates money for a private purpose which can only be raised and used for public objects."

So, in case of all the resolves above described, the payments "cannot be regarded in the light of compensation for services rendered." Those services in the case of past officials had already been paid for. In case of newly-elected officials who did not serve there could be no possibility of "services rendered." The same is true of payments of unearned salary for the time that officials were sick or incapacitated.

¹ 139 Mass. 341.

The law seems to be clear therefore that all these resolves are an illegal usurpation of power by the Legislature, exercised under the cloak of an unwise sentiment of charity.

There has been still another form of pure gratuities given by the State in the shape of *quasi* pensions; namely, the voluntary payment of military or State aid given under special circumstances by special resolves to persons not entitled to such aid under any statute. These grants have been made either to the person himself, not legally entitled to aid, or to some relation who was not eligible to receive any aid under the existing statute, and for whose benefit this special grant by resolve had to be made; as, for instance, "A. B., widow of X. Y., who served during the War of the Rebellion as seaman on board United States coast survey steamers, shall be eligible to receive State or military aid in the same manner and to the same extent that she would have been entitled to receive the same had her late husband served as an enlisted seaman in the United States navy;"¹ or to "A. B. and C. D., father and mother of X. Y., who served during the War of the Rebellion in Company E 4th Massachusetts Cavalry, and who died in said service, shall be eligible to receive State aid in the same manner and to the same extent as if fathers and mothers of deceased soldiers were expressly included in the classes of persons authorized to receive aid by said act;"² "that A. B., widow of X. Y., *alias* M. N., who was a sergeant in Company G 1st Regiment Louisiana Volunteer Cavalry, shall be eligible to receive State aid . . . in the same manner and to the same extent that she would have been entitled had said X. Y. served to the credit of the Commonwealth;"³ or to a mother "as if she had been dependent for support on her son at the time he was in the service."⁴ A most remarkable case is a special grant of State aid of the sum of \$224 to A. B., "being amount of State aid he would have received had he been born while his father was serving in the Massachusetts Volunteers."⁵ Twice have nurses in the Civil War been presented with sums of money.⁶ Of these special exceptions to the statute made as a pure gift by the Legislature, there have been, roughly estimated—2 in 1882; 2 in 1883; 12 in 1884; 6 in 1885; 6 in 1886; 13 in 1887; 10 in 1888; 25 in 1889; 13 in 1890; 24 in 1891; 23 in 1892; 6 in 1893; 1 in 1894; 2 in 1895; 2 in 1896; 3 in 1897.

¹ 1896, ch. 48.

² 1896, ch. 63.

³ 1886, ch. 64.

⁴ 1897, ch. 597; 1895, ch. 53.

⁵ 1897, ch. 23.

⁶ 1893, ch. 41; 1894, ch. 53.

The whole principle was radically wrong. Either the statutes were defective and should have been amended, or else the citizens of this State should have been forced to abide by the statutes. Special exceptions to the statutes should not be made in favor of individuals, no matter how hardly the statutes may press upon such individual or how much the peculiar circumstances of hardship may appeal to the Legislature. In fact, whether owing to the large increase in this class of gratuities or for other reasons, the Legislature has been forced several times to amend the statutes regarding this form of State assistance.

The second branch of gratuities consists of compensation for injuries received.

The largest class of these gifts is to persons injured while in the employ of the State. Compensation is apparently given on this basis alone, and regardless of the fact that in most of the cases the injuries were purely accidental or else not caused by any want of care on the part of the State or its employees. Thus, gifts have been made to employees of the State injured in the course of their employment at the Reformatory Prison for Women, the State Normal School, the Massachusetts Reformatory, the State Prison, the State Farm at Bridgewater, at State Primary School, State Reform School, at Revere Beach State Bath House or while working under the Metropolitan Sewerage and the Gypsy Moth Commission,¹ and the chief of the District Police has received such compensation for injuries.²

In 1893 a glaring case of pure gift occurred, when for injuries received at State Prison a watchman was awarded \$3,000 and "his salary during 1893 and for all the time that he has been or may be prevented by his injuries from discharging his duties."³ And two amusing cases of the assumption by the Legislature of responsibility for the acts of God are found, in 1891 when a man was given \$300 (to use the exact language), "as a gratuity in consideration of injuries received by him . . . said A. B. being struck by lightning and seriously injured while employed mowing on the

¹ 1897, ch. 9 (\$1800); 1895, ch. 66 (annuity of \$250); 1892, ch. 66 (five-year annuity of \$360); 1897, ch. 78 (\$2000); 1896, ch. 13 (annuity of \$360); 1895, ch. 40 (annuity of \$200); 1898, ch. 21 (annuity of \$600); 1894, ch. 65 (\$600); 1892, ch. 82 (\$500); 1886, ch. 54 (\$200); 1886, ch. 28 (\$200); 1880, ch. 26 (\$50); 1878, ch. 24 (\$226); 1895, ch. 105 (\$250); 1896, ch. 51 (\$250); 1897, ch. 76 (\$4000).

² 1884, ch. 5 (\$548).

³ 1893, ch. 106.

camp ground of the Commonwealth at Framingham,"¹ and in 1888 when \$200 were given to a man for injuries received "in assisting to save from fire one of the State Normal School buildings at Framingham."² It is difficult to see why the State should have compensated these men; or on what principle "a naval cadet who was detached from the training ship 'Enterprise' on January 27 and placed on board steamer 'St. Louis' on January 29 and was disabled for life by an accident occurring to him on said steamer" received \$500 from the State.³

There is also a large class of gifts of the public money as compensation for injuries, loss of time, and expenses sustained by members of the militia while on duty at camp or on parade.⁴ Wives of husbands and mothers of sons incapacitated from labor from injuries at camp and fathers of sons killed at the armory have been compensated.⁵

This has been carried to such an extent that in 1892 a five-year annuity of \$1000 was given to a man for loss of time and expenses at camp in 1888 and "for disabilities which are the result of a cold which settled in the eyes, making him blind and unable to earn a livelihood."⁶ And in 1890 a corporal of the guard received \$350 compensation for "a bayonet wound received from one of the guard in his leg, purely accidental, inflicting a most painful and dangerous wound, incapacitating him from labor for eight weeks."⁷ And a man in 1888 received \$218 for injuries while returning from camp.⁸

Then there is a class of cases of compensation by the State to private persons for loss or injury to their property (chiefly horses) in use by the militia, and to State servants and officers for loss of clothing and other property destroyed by fire in State buildings.⁹

The last class of cases under this branch of gratuities consists of compensations for injuries sustained by citizens of the State at the

¹ 1891, ch. 20.

² 1888, ch. 20.

³ 1896, ch. 55.

⁴ 1873, ch. 63 (\$300); 1876, ch. 37; ch. 38; ch. 39; ch. 40; ch. 41; ch. 44; 1882, ch. 23 (\$300); ch. 11 (\$300); 1886, ch. 62 (\$200); 1887, ch. 10 (\$92); 1890, ch. 32 (\$115); 1891, ch. 23 (\$150); 1894, ch. 26 (\$300); 1897, ch. 7 (\$175); 1898, ch. 67 (\$118); 1893, ch. 44 (\$75); 1892, ch. 24 (\$150); 1891, ch. 51 (\$200); 1894, ch. 28 (\$100); 1896, ch. 64 (\$300); 1895, ch. 9 (\$35); 1891, ch. 36 (\$297); 1898, ch. 17 (\$35.50).

⁵ 1892, ch. 56 (annuity of \$200); 1896, ch. 9 (a five-year annuity of \$300); 1894, ch. 37 (\$150); 1895, ch. 78 (\$500); ch. 80 (\$500).

⁶ 1892, ch. 81.

⁷ 1890, ch. 49.

⁸ 1888, ch. 51.

⁹ 1887, ch. 9 (\$170); 1889, ch. 48 (\$300); 1888, ch. 31 (\$500); 1895, ch. 122 (\$2088.05); loss of horse, 1887, ch. 24 (\$300); 1891, ch. 13 (\$200); 1893, ch. 52 (\$150); ch. 73 (\$150); ch. 21 (\$75); injury to horse, 1893, ch. 20 (\$150); 1884, ch. 25 (\$200); 1885, ch. 54 (\$250); 1895, ch. 50 (\$75); 1898, ch. 38 (\$40); 1894, ch. 63 (\$60).

hands of employees of the State, no distinction apparently being made between injuries arising from accident and those caused by negligence.

One hundred and fifty dollars have been given to a man for injuries received in consequence of the firing a salute by the State militia at General Cogswell's funeral; and \$307 for injuries from a spent ball during rifle practice of the Cadets.¹ Three thousand five hundred and forty-three dollars were given to a man for damages caused by the placing of infected swine upon his premises by servants of the State in the employ of the manager of the Troy & Greenfield R. R.;² \$1200 for loss of house, barn, and contents, destroyed by fire caused by Gypsy Moth employees;³ \$300 and an annuity of \$300 to the widow of a man killed by careless switching of cars on the Troy & Greenfield R. R.;⁴ \$1000 to a woman for injuries "received as a result of a collision, occurring without her fault, between a carriage in which she was seated and a vehicle belonging to the Massachusetts Reformatory in charge of one of the convicts."⁵

Perhaps the most extraordinary as well as the most recent case is the gift of \$2000, in 1898, to a lodging-house keeper for injuries to her house on Mt. Vernon Street, resulting from the tearing down and rebuilding of the State House.⁶ It was stated in the newspapers that these injuries largely consisted in loss of boarders, caused by the fact that the situation was rendered less desirable on account of the work being done on the State House.

The best illustration of this system of gifts is the case in 1891 where \$247.87 were paid to a company for injury to the premises occupied by it, caused by the settling of the floor of a room overhead, occupied by the State, through alleged negligent overloading. The Resolve itself states "the acts by which the floor of said room was caused to settle being of such a character that the *Commonwealth was not legally liable for any injury or damage done or caused thereby*."⁷

There are three great objections to this whole branch of State gratuities and to these payments for losses or injuries caused to, or by, employees of the State.

First, as before stated, such payments constitute robbery of the

¹ 1884, ch. 63; 1887, ch. 70.

² 1894, ch. 96.

³ 1898, ch. 61.

⁴ 1891, ch. 103.

⁵ 1886, ch. 74.

⁶ 1882, ch. 38.

⁷ 1898, ch. 89.

taxpayers. The Constitution of Massachusetts says, Part II., chapter I, section I, article 4: —

“The General Court has power to impose and levy proportional and reasonable assessments, rates, and taxes . . . to be issued and disposed of by warrant . . . for the public service in the necessary defence and support of the government of the said Commonwealth and the protection and preservation of the subjects thereof according to such acts as are or shall be in force within the same.”

The courts of the Commonwealth have been assiduous in their care of the citizen against improper expenditure of public moneys. The courts have time and time again laid down the proposition that taxation must be for public purposes only; and that the public funds must not be expended for the benefit of private individuals, no matter how praiseworthy in motive or how advantageous to the State such an expenditure might be.

In *Lowell v. Boston*,¹ in 1872, the court was called upon to decide whether the Legislature could authorize the city of Boston to loan money to property owners burned out in the great Boston fire. It was decided that the Legislature had no power to allow such expenditure of moneys raised by taxation, and it was said: —

“The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public services, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary.”

And in *Kingman v. Brockton* ² the Court said that: —

“It is necessary to recur and to adhere firmly to fundamental principles. The right of taxation by a city or town extends only to raising money for public purposes and uses.”

¹ 111 Mass. 460.

² 153 Mass. 258.

And in *Freeland v. Hastings*: — ¹

"A statute conferring such power would be obnoxious to the objection that it authorized the raising of money by taxation for the exclusive benefit of particular individuals; that it . . . appropriated money for a private purpose which could only be raised and used for public objects. It is hardly necessary to say that a statute designed to accomplish such purposes would be against common right, and would transcend the authority conferred on the Legislature by the Constitution."

It is interesting to test the above gratuitous grants by this standard. Hardly one can be said to be constitutional. There can be no doubt but that the State has relieved many cases of hardship and suffering; but hardship is no test of the propriety of a law or of taxation. It is just as great a hardship to the individual taxpayer to be obliged to contribute his money to be expended to relieve the suffering of some other individual.

It is not the duty of the State to play the part of philanthropist.

If a member of the militia or if any other servant of the State is injured in the course of duty, that is hard for him; but why should the State pay for it? It is no harder for him than for any private person who is injured in the course of his business. It is no more incumbent on the State to pay its employees for such injury than to pay any other individual.

There can certainly be no justice in allowing a man to recover damages from the State in cases where there would have been no legal liability had the injury been inflicted by the servants of a private person; that is, in cases where the injury was a mere accident, or one not caused by the negligence of any State employee. What reason, for instance, can be given for paying a man money simply because he happened to be struck by lightning while mowing the State camp ground? ² Why should the State pay for mere accidents, unless it is going into the business of accident insurance? Such gratuitous payments may be kind and philanthropic to the individual suffering, but they are entirely unconstitutional, and unjust to the mass of taxpayers.

Nor are the payments which have been made for injuries sustained by others, and due to the negligence or fault of State employees, proper or legal as the law now stands. This leads to the second objection.

If the Legislature thinks that the State should be legally liable

¹ 10 Allen, 589.

² 1891, ch. 20.

for its negligent acts, why should not the Legislature pass a general statute allowing the enforcement of such claims for injury by suit in the courts? Why should such liability be allowed or disallowed according to the whim of the particular Legislature?

But far from allowing such a right of suit to individuals, the Legislature and the courts have been very jealous in guarding the sanctity of the State against such suits in the courts. As Judge Gray said in *Troy & Greenfield R. R. v. The Commonwealth*: —¹

“It is a fundamental principle of our jurisprudence that the Commonwealth cannot be impleaded in its own courts except by its own consent, clearly manifested by act of the Legislature;”

and in *Briggs v. Light Boats*,² in 1860, Judge Gray had explained the reason for this doctrine (which had existed in this State as far back as 1812),³ saying “that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign to subject him to repeated suits as a matter of right at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.”

In 1879, Governor Talbot, in his inaugural address, recommended, and the Legislature passed, an act allowing the bringing of suits or “claims founded on a contract for the payment of money” against the State.⁴

In 1887 another act was passed⁵ allowing “all claims whether at law or in equity” to be enforced against the State. But in *Murdock Grate Co. v. Commonwealth*,⁶ in 1890, the court held that the statute of 1887 could not be meant by the Legislature to create “an entirely new class of claims for which a sovereignty has never been held responsible and to impose a liability therefor,” and so it held that the State could not be sued for negligence in overloading the floor of a building and causing damage to the plaintiff.

“We do not find that demands founded on the neglect or torts of ministerial officers, engaged as servants in the performance of duties

¹ 127 Mass. 46 (1879).

² 11 Allen, 162.

³ See *Sewall v. Lee*, 9 Mass. 370; *Commonwealth v. André's heirs*, 3 Pick. 225 (1825); *Pingree v. Coffin*, 12 Gray, 321 (1858); *Dewey v. Garvey*, 130 Mass. 86 (1881).

⁴ See Acts of 1879, ch. 255, and *Milford v. Commonwealth*, 144 Mass. 64, and *Wesson v. Commonwealth*, 144 Mass. 60.

⁵ Acts of 1887, ch. 246.

⁶ 152 Mass. 28.

which the State as a sovereign has undertaken to perform, has ever been held to render it liable. Nor does this rest upon the narrow ground that there are no means by which such obligations can be enforced, but on the larger ground that no obligations arise therefrom. Municipalities, such as cities and towns, are created by the Commonwealth in order that it may exercise through them a part of its powers of sovereignty. Where they are engaged in the performance of public duties imposed upon them by statute, they are not liable to public actions of tort for the negligence of their agents employed for this purpose, unless such action is provided by statute. *Hill v. Boston*, 122 Mass. 344; *Curran v. Boston*, 151 Mass. 505.

"Where wrongs are done to individuals by those who are the servants of the government, those injured are not remediless, as such persons may be sued as may other citizens for the torts which they commit. There may be cases also where it would be entirely just that a remedy should be extended by the public to an individual for the injury he had sustained by the negligence of a public servant; but cases of this character the Legislature yet reserves for its own determination."

It is thus seen that the Legislature has expressly omitted to provide by statute for a liability on the part of the State, and there are good grounds for argument that the State should not be liable in cases of this kind, *i. e.*, "for neglect of a public duty imposed upon it by law for the benefit of the public, and for the performance of which it receives no profit or advantage."¹ It is therefore clearly unjust and unconstitutional for it to make, by resolve, special exceptions in behalf of certain individuals; and to pay them sums of money to which they are not legally, under the law, entitled.

The third objection is that the Legislature is an utterly unfit body to decide upon the justice of these claims.

Waiving the legality or illegality of the payments, the Legislature is not a tribunal competent or fitted to ascertain the real extent of the injuries claimed to be suffered, or to judge of the proper compensation for such injury. This will be readily seen when the method by which these sums of money are granted is clearly understood. It is as follows: Let us suppose that a man is injured while at camp, or that an employee of the Gypsy Moth Commission is hurt by falling out of a tree. He goes to his senator or representative to see if he cannot put his hand into the

¹ See *Hill v. Boston*, 122 Mass. 344, where in 1887 the court held that the city could not be sued on account of injuries sustained from a defective staircase in a city school building.

public grab-bag and pull something out of the State. The legislator from sympathy, or from a desire to get votes, or from an inability to say "No," introduces a resolve calling for robbery of the public treasury in favor of his constituent. The resolve is referred to some appropriate committee, the committee on military affairs, or the committee on agriculture, or on public institutions, or on prisons, as the case may be. The petitioner for damages appears either personally or by counsel. A brief hearing is held. He is questioned by members of the committee; in rare cases one or two witnesses are heard. No counsel represents the State. There is no rigid cross-examination. The legislator who introduced the resolve makes an affecting appeal in behalf of the injured man. Some other friendly senator or representative, who knows little about the claim, is persuaded by the legislator to speak in favor of his pet resolve. The committee reports generally in favor of the robbery. It goes to the House, and, like all bills or resolves involving expenditure of money, is sent to the committee on ways and means. This committee, overwhelmed with work, gives a very casual consideration of the resolve, or in the case of those involving any large expenditures of moneys, listens to one or two witnesses, and reports it to the House. Meanwhile the legislator who introduced the resolve sees various members, logrolls, and impresses the House and Senate generally with the hardship of the case; and the House and the Senate pass it in a burst of sympathy and philanthropy, with little consideration of the legal standing of the claim, or of the rights of the taxpayers of the State to be protected against unconstitutional expenditure of the State's money. Such being the method of procedure, can any one believe that these resolves are a proper means of imposing a liability to pay money upon the State? None of the procedures of a court are used. The real responsibility for the injury, the real amount of damage caused, the real standard of compensation, cannot be ascertained by a committee. There is no provision for cross-examination, no representation of the State's side of the case, no certainty that all of the facts of the case are before the tribunal.

If the State should be liable for these injuries, that liability should be tested in court through the ordinary procedure of law like any other legal liability.

The illustration given above is the best proof of the injustice and illegality of those resolves. In the Murdock Grate Co. case the company had sued in court, and the Supreme Court had held,

not only that the State was not liable, but that the Legislature never had intended that it should be liable in such cases, and that it was contrary to public policy that the State should be required to pay damages of this kind. Having lost its suit in court, the plaintiff then went to the Legislature, and received from it a special compensation in the shape of a resolve granting the money which the court had said the State ought not to be required to pay.

The third branch of State gratuities consists of dispensations of charity, pure and simple, to individuals, from the money contributed in taxes by other individuals.

Thus in 1881, \$5000 was given to citizens and taxpayers of the town of Westfield for the purpose of rendering them some relief in view of the disastrous floods there.¹ And the bad precedent was followed in the presentation to citizens of the town of Lee of \$3000 in 1886 for the same reason.²

In 1886, \$2000 were given to the town of Monroe for the cost of a road ordered to be built by the county commissioners, which was claimed to be "of little benefit to the town but entirely to the benefit of the State by contributing to the business of the Troy and Greenfield R. R. and the Hoosac Tunnel;" and in 1888, \$2500 were given to the town of Florida for the same reason.³ Two thousand four hundred dollars were presented in 1884 to twelve inhabitants of Gay Head "for their perilous, effective and meritorious service in the lifeboat, whereby lives of twenty persons were saved from the wreck of the steamer 'City of Columbus.'"⁴ Three thousand dollars were in 1893 given to A. B. and "the family of five men who lost their lives in attempting to rescue the crew of brig 'Aquatic' wrecked on Cuttyhunk,"⁵ and \$47.20 to the town of Nantucket in 1898, "being the amount expended in caring for the crews" of certain wrecked vessels.⁶

In 1883, \$4836.51 were presented to a certain contractor for "loss sustained under a contract with the State for work done on the Hoosac Tunnel." So, too, a contractor was presented in 1898 with \$1374 for "loss sustained by reason of an error in a contract for building a public bath house for the State." And in 1887, \$2500 were given to the owner of a building for loss on account of

¹ 1881, ch. 46.

² 1886, ch. 35; 1888, ch. 80.

³ 1893, ch. 36.

⁴ 1886, ch. 66.

⁵ 1884, ch. 41.

⁶ 1898, ch. 22.

the refusal of the State to take a lease.¹ Six hundred dollars were given in 1896 to an agricultural society for bounties for 1895, "being the amount which said society would have been entitled to receive had it been incorporated by an act of the Legislature."² In 1896 also a man was compensated for the value of a cow condemned and killed by the Board of Health; and the town also had its expenses for killing and burying said cow, \$45 in all.³

On principle, there can be no possible defence of the legality or constitutionality of these payments. Possibly they were meritorious; possibly the persons paid were worthy recipients of charity. But the fact still remains that it is not the duty or the right of the Legislature to dispense charity to favored individuals.

The whole matter may be summed up in one sentence. The Legislature has simply followed the motto of the New York politician: "What is the constitution among friends?"

The language of President Cleveland's veto of the Bill for the special distribution of seeds in the drought-stricken counties of Texas is particularly applicable: —

"I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering, which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that *though the people support the Government, the Government should not support the people*. Federal aid in such cases encourages the expectation of paternal care on the part of the Government and weakens the sturdiness of our national character."⁴

If any one believes that, after all, this whole question is a matter of slight importance, let him consider the following table and the notable increase in expenditures of this kind.

The following is a record made up as nearly accurately as possible from the Acts and Resolves of the various years from 1882 of the yearly sum of State gratuities to individuals, leaving out entirely payments made in the form of military or State aid as exceptions to the statutes, and also leaving out all payments of aid to private hospitals, etc.

¹ 1883, ch. 53; 1887, ch. 65; 1898, ch. 80.

³ 1896, ch. 37.

² 1896, ch. 85.

⁴ Veto Message, Feb. 16, 1887.

1882	\$2,625.00	1891	\$16,231.71
1883	\$6,836.51	1892	\$8,166.17
1884	\$5,391.00	1893	\$15,664.47
1885	\$1,761.00	1894	\$16,311.32
1886	\$14,653.00	1895	\$14,107.69
1887	\$7,157.00	1896	\$18,885.43
1888	\$10,342.12	1897	\$12,072.79
1889	\$7,491.80	1898	\$8,104.70
1890	\$3,673.00		

Previous to 1882 from 1872 to 1882, such payments averaged \$1000 a year.

But the evil and injustice arises not so much from the amount of money so expended, as from the violation of the fundamental principles of our government. "The right to tax is the right to raise money by assessing the citizens for the support of the Government and the use of the State. The term 'taxation' imports the raising of money for public use, and excludes the raising of it for private use."¹ "An appropriation of money raised by taxation, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power . . . it is independent of all considerations of resulting advantage. . . . It needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken and an unjustifiable usurpation."²

That being the language of the Supreme Court of Massachusetts, in view of the instances given above of usurpation by the Legislature, the tax-paying citizen is certainly justified in calling the Commonwealth a philanthropic robber.

Charles Warren.

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¹ *Mead v. Acton*, 139 Mass. 341.

² *Lowell v. Boston*, 111 Mass. 462.

A PROPOSED NEW DEFINITION OF A TORT.

NOT only in Jurisprudence, but in its sister sciences, for instance, Ethics and Economics, do we find striking illustrations of the truth that it is concerning the most fundamental and far-reaching definitions, that there exists the most doubt and dispute. Although acts such as we call *torts* have been committed since the dawn of the idea of the existence of rights as between man and man, yet the development of anything like a clearly formulated conception of a tort is surprisingly recent. Thus, so late as 1886 it was said by Sir Frederick Pollock that "if the collection of rules which we call the law of torts is founded on any general principles of duty and liability, those principles have nowhere been stated with authority."¹

But it seems to us to scarcely remain true, as stated by the same authority, that "the want of authoritative principles (*i. e.*, on this subject) appears to have been felt as a want by hardly any one."² The necessity of establishing such principles is rapidly being forced upon us by decisions involving modern conditions,³ thus, decisions relating to strikes and boycotts. But these very decisions seem to us to furnish the material for constructing a satisfactory definition of a tort.

We need not dwell at length on previous attempts to define a tort. The New York Court of Appeals has complained of its inability "to find any accurate and perfect definition of a tort."⁴ Mr. Addison in his elaborate treatise entirely avoids definition thereof. Sir Frederick Pollock defines it as "an act or omission giving rise, in virtue of the common law jurisdiction of the court, to a civil remedy which is not an action of contract."⁵ Professor Jaggard in his recently published treatise, says that "the above definition of Mr. Pollock, while a negative one, seems to be least unsuccessful and unsatisfactory."⁶ Judge Cooley thinks that the

¹ Pollock, *Torts*, 4.

² Pollock, *Torts*, 5.

³ See, for instance, *Mogul Steamship Co. v. McGregor*, [1892] App. Cas. 25; *Allen v. Flood*, [1898] App. Cas. 1.

⁴ *Rich v. N. Y. Central, &c., R. R. Co.*, 87 N. Y. 382, 390 (1882, Finch, J.).

⁵ Pollock, *Torts*, 4.

⁶ Jaggard, *Torts*, i. 2.

definition given in the English Common Law Procedure Act, "a wrong independent of contract," "is perhaps as good a definition as can be given."¹ Mr. Bishop's definition is "an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, one's disturbance of another in rights which the law has created, either in the absence of contract, or in consequence of a relation which a contract had established between the parties."²

But these definitions merely exclude from their scope injuries resulting from breach of contract; they leave us without a criterion to apply to that vast field of injuries wholly unconnected with contract. No line of separation is established between, for instance, the injuries resulting from words that are, and those that are not, privileged, or between acts of a landowner that are, and those that are not, tortious.

The illustrations already given foreshadow our definition. It seems to have already been apprehended that a classification, if not a definition, of torts may be based on the *relation* of some party concerned. Such classification, as thus far attempted, has referred rather to some relation of *the party injured*, than of *the party committing the injury*.³

But, in seeking to establish our definition of a tort, we propose to look, not to any relation of the injured party, but to *the relation of the party committing the injury*. In this view, an injury having been committed, the answer to the question whether it is actionable as a tort will in some way depend upon the *relation* of such party. In the hope of being able to justify our definition, we here state it as "*an act or omission, not a mere breach of contract, and producing injury to another, in the absence of any existing lawful relation of which such act or omission is a natural outgrowth or incident.*"

Injuries committed by the proprietor of land seem to furnish excellent material for the test and application of our definition. For instance, where, as the result of the owner of land digging a ditch thereon, the owner of adjoining land was injured, in that water was diverted from his well, it was properly held that no action would

¹ Cooley, Torts, 2d ed., 3.

² Bishop, Non-Contract Law, 4.

³ See, for instance, the learned discussions by Prof. Wigmore on "The Boycott and Kindred Practices as Ground for Damages," in *Am. Law Rev.*, xxi, 509 (1887), and on "A General Analysis of Tort Relations" in *HARVARD LAW REVIEW*, viii, 377 (1895). In the former article are discussed *the relations of the injured party* to customers, servants, and contractors.

lie.¹ What was the proper ground of this decision? Simply this, that digging the ditch was *a natural outgrowth or incident of the relation of landowner*. But not every act done upon land by the owner thereof is a natural outgrowth or incident of his relation as such owner. An illustration is furnished by a resurrected decision² that gave some of the judges so much trouble in *Allen v. Flood*. There an action was held to lie for firing a gun on one's own land, whereby wild fowl were frightened from a neighbor's decoy. As is well said by Lord Herschell in *Allen v. Flood*,³ *Keeble v. Hickeringill* "may be supported by the circumstance that, *if the defendant merely fired on his own land in the ordinary use of it*, his neighbor could make no complaint, whilst, *if he was not firing for any legitimate purpose connected with the ordinary use of land*, he might be held to commit a nuisance." Here the court come pretty near a conception of a tort as we have defined it, saying in effect that the injury under consideration in *Keeble v. Hickeringill* was actionable, because produced by an act that was not *a natural outgrowth or incident of the relation of landowner*.

The relation of *employer* will be found to sustain the legality of acts which, though producing injury to an employee or a third person, are yet natural outgrowths or incidents of the relation. Thus, the injury done to an employee by discharging him is not actionable, in the absence of contract. So we are enabled to perceive the true ground of such decisions as *Heywood v. Tillson*,⁴ where the refusal of an employer to employ or retain in his service any person renting specified premises, was held to give no right of action to the owner of such premises. The same may be said of *Payne v. Western and Atlantic R. R. Co.*,⁵ holding that no action would lie for discharging (or threatening to discharge) employees because of their patronage of the plaintiff. A contrary view was taken in *International and G. N. Ry. Co. v. Greenwood*; ⁶ *Graham v. St. Charles Street R. R. Co.*⁷ But might not the result have been otherwise in these cases, had the courts been guided by the definition of a tort as we have stated it? Such acts of an employer as "lockouts" and "blacklisting" may also be suggested as properly subject to the test we have indicated.

¹ *Phelps v. Nowlen*, 72 N. Y. 39 (1878).

² *Keeble v. Hickeringill*, 11 East, 574 (1706).

³ [1898] App. Cas. 1, 133.

⁴ 75 Me. 225 (1883).

⁵ 2 Tex. 76 (Civ. App. 1893).

⁶ 13 Lea (Tenn.), 507 (1884).

⁷ 47 La. Ann. 214 (1895).

The relation of *party to a lawful contract* seems to be the basis of the legality of certain acts. Thus where no action was held to lie for procuring a discharge from employment, by threatening the employer that the defendant would terminate a contract, that by its terms he had the right to terminate at any time.¹ So where an action by a member of a combination among fire insurance companies and agents to fix rates, was held not maintainable as for a conspiracy to destroy the plaintiff's business as an insurance agent, merely because of the combined action of the defendants to enforce the rules and penalties against him, as by imposing fines and revoking agencies.²

But the most conspicuous relations are two that have within recent years been rapidly brought to the front by modern trade conditions, namely, those of *trade competitor* and of *employee*. And, conspicuous among the many weapons used by trade competitors and by employees, stand the act of inducing a refusal to deal and the kindred act of inducing a breach of contract.

It seems long ago to have been recognized, that the relation of trade competitor might furnish a justification for all acts the natural outgrowths or incidents of such relation. Thus, in a decision made in 1410,³ and frequently referred to in *Allen v. Flood*, where no actionable wrong was held to have been committed by a school-master in setting up a school to the damage of an ancient school, whereby the scholars were allured from the ancient school to come to his. Another instance of the recognition of such relation is found in *Bowen v. Matheson*.⁴ Nevertheless, until comparatively recently, this relation seems to have been largely ignored. This is strikingly manifest from a comparison of *Lumley v. Gye*⁵ with *Mogul Steamship Co. v. McGregor*.⁶ In *Lumley v. Gye* what should have been a fundamental consideration was in our view completely ignored. There, after elaborate discussion, was interjected into our jurisprudence the doctrine of liability for inducing a breach of contract (in this case, to perform at a theatre). But, assuming that under any conditions such a liability exists, the court should have gone farther and considered such questions as these: In what relation stood the party doing the injury complained of? Was it that of employee, trade competitor, or the like? Was such relation a law-

¹ *Raycroft v. Tayntor*, 68 Vt. 219 (1896).

² *Beechley v. Mulville*, 102 Iowa, 602 (1897).

³ 11 Henry IV., Fol. 47, Pl. 21.

⁴ 2 El. & Bl. 216 (1853).

⁵ 14 Allen (Mass.), 499 (1867).

⁶ [1892] App. Cas. 25.

ful one? Was the act of inducing a breach of contract a natural outgrowth or incident of such relation? Now, there is no reference whatever, in the points of counsel or in any of the elaborate opinions in the case, to the circumstance that the relation of the defendant to the plaintiff was that of *trade competitor*. In the view we have taken, the main question for consideration in *Lumley v. Gye* was simply whether the act of inducing a breach of contract created any liability, in view of such act being the natural outgrowth or incident of the relation of trade competitor. The matter was discussed on the proper ground in *Bourlier v. Macauley*,¹ where it was held not actionable for a *rival theatrical manager* to induce an actress to break her engagement at another theatre, *for the purpose of performing at his own*. The court here follow *Chambers v. Baldwin*,² where it was held not actionable for a *trade competitor* to cause the breach of a contract to sell goods, *with the design of himself becoming purchaser*. The court say: "*Competition in every branch of business being not only lawful, but necessary and proper*, no person should or can upon principle be made liable in damages, for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business." In *Mogul Steamship Co. v. McGregor*, the relation of the parties committing the acts complained of, is not ignored, as in *Lumley v. Gye*. Nay, rather "the stone which the builders rejected, the same is become the head of the corner," and the decision is in effect on the ground that such acts were the natural outgrowths or incidents of the relation of trade competitor. Thus it was said in the Court of Appeal³ by Bowen, J., who, of all the judges rendering opinions in that celebrated case, seems to have most clearly comprehended the real point involved: "The defendants have done nothing more against the plaintiffs, than pursue to the bitter end a war of competition, waged in the interest of their own trade." That is to say, the injuries done by the defendants to the plaintiffs were but the natural outgrowths or incidents of the relation of trade competitor, and hence not actionable.

Limitations of space forbid us to discuss at length the recent applications of the relation of trade competitor, as a justification of injuries produced by acts the natural outgrowths or incidents

¹ 91 Ky. 135 (1891).

² 91 Ky. 121 (1891).

³ 23 Q. B. D. 598, 614 (1889).

thereof. See for instance *Lough v. Outerbridge*; ¹ *Continental Ins. Co. v. Board of Underwriters*.² We content ourselves with a passing reference to the clashing authorities on the question of the legality of a boycott of a trade competitor. As sustaining its legality we cite *Bohn Manuf. Co. v. Hollis*; ³ *Macauley v. Tierney*; ⁴ to the contrary are *Jackson v. Stanfield*; ⁵ *Olive v. Van Patten*.⁶

We pass to the relation of *employee*. Out of the fogs and mists of obscurity and difficulty that have hitherto enveloped discussions as to the legality of the acts of employees, especially when acting in combination, there seems to be now emerging the clear conception of the test of *the relation of employee* by which to determine the legality of a given act of an employee. A great step in advance will have been taken, when once it is generally apprehended that the same test is applicable to the relation of employee, as to that of trade competitor, or, to put it in another way, the employee is, for the purpose of applying this test, to be regarded as a competitor of his employer. This view seems to have been adopted in *Allen v. Flood*; and see *Sinsheimer v. United Garment Workers*; ⁷ dissenting opinion of Holmes, J., in *Vegelahn v. Guntner*; ⁸ dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*⁹ But see, on the other hand, *Barr v. Essex Trades Council*.¹⁰ Now, in the two cases last cited, where it was held actionable for employees (or persons acting in their behalf) to induce third persons to refuse to deal with their employers, had the question been clearly presented to the courts whether the acts of the employees were not *the mere natural outgrowths or incidents of their relation as employees*, different conclusions might have been reached. These observations are also applicable to such decisions as *Moore v. Bricklayers' Union*; ¹¹ *Old Dominion Steamship Co. v. McKenna*; ¹² *Casey v. Cincinnati Typographical Union*.¹³ But here, as before, limitations of space forbid us to discuss at length the cases where the test of the relation of employee was or might have been applied.

¹ 143 N. Y. 271 (1894; closely following *Mogul Steamship Co. v. McGregor*).

² 67 Fed. Rep. 310 (Cir. Ct. Cal. 1895).

³ 54 Minn. 223 (1893).

⁴ 19 R. I. 255 (1895).

⁵ 137 Ind. 592 (1894).

⁶ 7 Tex. 630 (Civ. App. 1894).

⁷ 77 Hun (N. Y.), 215 (1894).

⁸ 167 Mass. 92, 107 (1896).

⁹ 83 Fed. Rep. 912, 936 (C. C. A. Eighth Cir., 1897).

¹⁰ 53 N. J. Eq. 101, 124 (1894).

¹¹ 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn. 1889).

¹² 30 Fed. Rep. 48 (Cir. Ct., N. Y., 1887).

¹³ 45 Fed. Rep. 135 (Cir. Ct., Ohio, 1891).

A strong justification of our definition is that, so far as concerns an injury produced by mere words, as in case of slander and libel, it is already in effect applied in the doctrine of privilege. Acts of fraud or negligence are clearly tortious under our definition, not being the natural outgrowths or incidents of any lawful relation.

An incidental benefit of the adoption of our definition, would be the abandonment of false and misleading tests of liability that have wrought so much confusion. Conspicuous is the test of intent, which has received from *Allen v. Flood* its death-blow in England. It is to be hoped that *Allen v. Flood* will soon be generally followed on this point in this country. Perhaps the same condemnation should be extended to the idea that has, somehow or other, of recent years, no one seems to know just how, sneaked into our jurisprudence, that a civil liability is created by a number of individuals doing in combination what it would be lawful for each to do singly. If this idea ever had any foothold in British jurisprudence, it seems now to have been repudiated in Great Britain.¹ Though it has received considerable countenance in this country, it was repudiated in such decisions as *Bohn Manuf. Co. v. Hollis*;² *Macauley v. Tierney*;³ and see the forcible and eloquent argument of Caldwell, J., in *Hopkins v. Oxley Stave Co.*⁴

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¹ See *Kearney v. Lloyd*, L. R. 26 Ir. 268 (1890); *Huttley v. Simmons*, [1898] Q. B. 181.

² 54 Minn. 223, 234 (1893).

³ 19 R. I. 225 (1895).

⁴ 83 Fed. Rep. 912, 930 (C. C. A. Eighth Cir., 1897).

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NEW YORK AND THE CONSTITUTIONALITY OF THE ANTI-SCALPER ACT.—A statute which in substantially the same form has remained for forty years on the statute book of New York, and which during that time has received the unqualified support of the courts, has now been held unconstitutional by the Court of Appeals, *People v. Warden of City Prison*, New York Law Journal, Nov. 28 and 29, 1898. The statute forbade the sale of passage tickets on any railroad or vessel except by the authorized agents of transportation companies. The applicant was arrested for selling a ticket from New York to Norfolk, Va., without authority from any transportation company. He applied for a writ of *habeas corpus*, claiming the statute was unconstitutional, in that by preventing his engaging in a lawful business—that of ticket broker—it deprived him of his liberty without due process of law. The Supreme Court held unanimously that the law was constitutional; but the Court of Appeals has now reversed this decision by the close vote of four judges to three. This ruling upsets what had been thought the settled policy of the state. It is also in conflict with the decisions in the other states which have similar statutes. *State v. Corbett*, 57 Minn., 345. A recent case in Illinois, *People ex rel. Geis et al. v. Pease*, reported in Chicago Legal News, Nov. 12, might give it some support, but that decision is only in a circuit court and seems at odds with a decision of the Supreme Court of that state. *Burdick v. People*, 149 Ill. 600.

When the court holds that the word "liberty" as used in the fourteenth amendment embraces the right to exercise a trade, they state the established New York rule. But this use of the word seems an extension beyond its legitimate meaning, and in spite of its approval in the case of *Allgeyer v. Louisiana*, 165 U. S. 578—[where the opinion was given by a former New York judge]—the point seems still open to contest in those states which have not committed themselves. Aside from that

matter, however, the holding that the deprivation of this liberty is without due process of law, is more objectionable. For due process of law two elements are necessary: a legal mode of procedure, and a legal purpose. A law which, as in this case, is to be enforced by the courts, and which is passed in due form by the legislature is undoubtedly one mode by which a citizen may be legally deprived of his liberty. Providing a law is passed to promote the health, comfort, safety, or welfare of society, and violates no other provision of the constitution, its purpose is one which will justify such a deprivation. Of course the act must in a fair and reasonable sense advance some of these objects. A causeless arbitrary deprivation will be declared unconstitutional, for it was to prevent exactly this kind of deprivation that the clause was inserted in the amendment.

The court in the principal case admit the law to be as has been stated, and rest their decision on the ground that there is no connection between the act in question and the public welfare. Yet in the dissenting opinions it appears that the act was designed to check certain real evils, — the sale of stolen tickets, counterfeit tickets, or tickets altered in date, destination, or apparent transferability. To this end the act limited the right to sell to persons for whose actions the transportation companies would be responsible. Can it be said the remedy had no connection with the evil? It was also intended to prevent the violation of pooling contracts by the underhand sale of cut rate tickets. Accomplishment of these objects would certainly conduce to the general welfare, and it is hard to agree with the court that the act in no way tends to accomplish them.

THE BREACH OF BLOCKADE.—What acts constitute a breach of a blockade is always a perplexing question. During the late blockade of the Cuban ports the steamship "Newfoundland" was brought to by one of the blockading fleet ten miles to the northeast of Havana, and was formally warned away. Four hours afterward she was captured seventeen miles to the northwest of Havana. She could give no satisfactory account of her presence in the first instance, or of her subsequent delay before the port. Accordingly she was condemned by the district court upon the ground that she was loitering upon the high seas near a blockaded port with intent to enter if opportunity offered, and that this action was a breach of the blockade. *The Newfoundland*, 89 Fed. Rep. 99, 510 (Dist. Ct., S. C.).

The decision of the prize court upon the preliminary question that the *locus* of the breach need not be within the territorial waters of the enemy, though contrary to the opinion of certain continental publicists, is incontrovertible. To render blockade effective the belligerent must be conceded a certain *dominium* over the waters about the place beset. Upon the main question the decision that this loitering constituted a breach of blockade also seems sound. Actual entrance into the port blockaded is indeed not requisite: an overt attempt to pass the cordon is clearly a breach. *The Neptunus*, 2 C. Rob. Adm. 110. But other acts less unequivocal are held breaches of blockade, and within this category falls the principal case. Of these as a class Lord Stowell tentatively advanced the principle that a neutral ship cannot innocently be found in a situation where it may be possible to elude the blockading fleet with impunity; a presumption arises that she is there with intent to break the blockade. *The Neutralitet*, 6 C. Rob. Adm. 30. So, if a ship's course be laid so close to a blockaded

port that an opportunity to slip in might present itself, or if she approach a blockaded port to take a pilot for a neighboring port, or if she appear before a blockaded port for the alleged purpose of inquiry there is a breach of the blockade. *The Gute Erwartung*, 6 C. Rob. Adm. 182; *The Charlotta Christine*, 6 C. Rob. Adm. 101; *The Cheshire*, 3 Wall. 235. Thus the decision reached in the principal case, although the acts are extreme, is well founded upon authority. The position of the "Newfoundland" in loitering four night hours within ten miles of a blockaded port near enough to signal the shore and watch an opportunity to slip in was in itself an act of breach of the blockade and gave rise to a *prima facie* presumption of guilty intent. And as no innocent explanation of her acts was proved, the condemnation was entirely proper. If blockade is to be maintained to-day, the law must be stricter for a steamer than it was for the sailing ship in the past.

FORGED INDORSEMENTS OF NEGOTIABLE INSTRUMENTS. — A notable instance of the effect of equitable principles upon the law of negotiable instruments was the decision by Lord Mansfield in the case of *Price v. Neal*, 3 Burr, 1354. In that case the defendant was an indorsee of a bill for value in due course, and was without notice that the signature of the drawer was a forgery. In like ignorance the plaintiff, who was the drawee, paid the face value of the bill to the defendant. On learning the facts, he sought to recover back the amount paid by him. The court, in holding that no recovery could be had, said "there is no reason to throw off the loss from one innocent man upon another innocent man." Courts have almost universally supported the decision as well as the principle on which it rests, namely, that when two innocent parties have been thus defrauded, one will not be deprived of the legal title to the money which he has received in order that the other may be made whole. See the article by Professor Ames, 4 HARVARD LAW REVIEW, 297.

There is, however, a well recognized distinction between this and another class of cases, which is illustrated by a recent decision of the Supreme Court of Nebraska. *First Nat. Bank v. Farmers' & Merchants' Bank*, 76 N. W. Rep. 430. There a loan company was induced by the fraudulent representations of an agent to draw a check payable to a person who was in fact non-existent. The agent received the check for delivery to the ostensible payee, but forged the name of the payee and made delivery to the defendant, who then collected the amount of the check from the bank on which it was drawn. The court held that the bank could recover back the amount, although the defendant paid value for the check and received it in good faith. Here the court was, as in *Price v. Neal*, *supra*, dealing with two innocent parties. Yet there is this difference. In this case the check remained the property of the drawer until delivery should be made by the agent to the person intended as payee; upon the transfer, therefore, to the defendant under the forged indorsement, the latter became liable to the true owner, the drawer, for a conversion of the check; however innocent, he was a wrongdoer. The money thereafter received by him in dealing with the property of the drawer was wrongfully gained, and he became a constructive trustee for the drawer. Now, if the drawer in this case had been an indorsee in due course and had been so deprived of his property, he could still have recovered against the drawee, since the fact that payment was made to the wrong person

would be no defence. Then the drawee would have been entitled to be subrogated to his rights as *cestui que trust* against the converter. Here, however, the drawer had no right of action against the drawee. Can, then, the doctrine of subrogation be applied? It may be objected that it cannot; that in order to be subrogated to the right of the drawer against the converter, the drawee must first have paid the equivalent of that claim to the drawer. Yet it is clear that this drawer cannot retain his claim as *cestui que trust*. He cannot both be enriched by the amount paid by the drawee and at the same time refuse to give the latter allowance for the amount on account. Therefore the term "subrogation" seems to have an appropriate application here in a broader sense, namely, that when one person has an equitable right to which another is entitled, that other should have the right on grounds of natural justice. The result is reached, as in the principal case, by courts of law allowing a direct action to recover back the money paid; yet, on principle, the right of the drawee is an equitable one to be placed in the position of *cestui que trust*, so that he may then sue the wrongdoer.

SEALED VERDICTS. — Even in the early development of the trial by jury, the idea existed that the jury should be left absolutely to themselves in their final consideration and decision. To insure this privacy the old oath administered to the bailiff read, "you shall keep this jury without meat, drink, fire, or candle, you shall suffer none to speak to them, neither shall you speak to them yourself."

In that older and most summary justice the work of the juries was less arduous, yet for their ease was introduced the device of the privy verdict. When a court adjourned while the jury was still out the jury might, on reaching an agreement, reduce their verdict to writing, seal it, leave it with an appointed officer, eat and separate, to reassemble at the opening of the court to give a final oral verdict. This expedient, though mentioned as early as Rolle's Abridgement, p. 712, was rare, and never used in trials of felony. In the modern practice, particularly in this country, it has been far more common. In almost all the States, in all cases, civil or criminal, except capital, either by statute, by agreement of the parties, or sometimes by order of the court without agreement, the jury may separate after a privy, or sealed, verdict as it is called here and meet again to affirm it at the next court-day.

The important question is as to the legal effect of that sealed verdict. In the old law it was clearly a mere nullity. When the jury came together again, the beaten party, or the accused, had a right to ask the decision of each juror separately, poll them, as it is called, just as in the ordinary case, and their answers, if unanimous, were the final verdict. They might well dissent from or change their privy verdict, — it was simply a device for their comfort. *Saunders v. Freeman*, 1 Plowd. 209. But it is not clear whether the effect of the modern sealed verdict is the same. The question was squarely raised in the recent case of *The People v. McLaughry*, Chicago Law Journal, Dec. 2, 1898. There no verdict was given in open court and a sentence was passed on the sealed verdict. It was argued that the prisoner by consenting to a sealed verdict waived his right to the oral one, that at least the error merely gave ground for a new trial; but the Court, following the old law strictly, held that the sealed verdict amounted to nothing, that the sentence under it was abso-

lutely unlawful, and as the prisoner had been once in jeopardy he might have the benefit of the *habeas corpus*. It cannot be doubted that justice was cheated again. Such judicial escapes as this have led to a general relaxation of the criminal procedure, and it may be urged that it is the merest form to require the jury to reaffirm its written verdict. On the other hand it may be a valuable privilege for the accused to ask the final decision of each of his triers separately when the coercion of the majority of the fellow-jurors ceases to have effect; he would have had this privilege if there had been no sealed verdict, — why should he lose it? The oral verdict is at most only a slight formality, not harassing, and seldom objected to. The conservative decision in the principal case represents the bulk of the American authority, though states like Massachusetts and Virginia, which have done away with polling, might well refuse to follow it.

PROPERTY IN ANIMALS *FERÆ NATURÆ*. — When an animal *feræ naturæ* is reduced into possession, the possessor gains a qualified proprietary right. The limitations of that right were involved in a recent decision of the New York Supreme Court. *Mullett v. Bradley*, 53 N. Y. Supp. 781 (Sup. Ct. App. Term.). A sea-lion, brought from the Pacific coast to Long Island, escaped from the possession of its owner, and was abandoned by him. A year afterward it was recaptured upon the New Jersey coast by a fisherman, seventy miles from the place of escape. Upon these facts it seems clear that the former owner had forfeited his right by the abandonment. *Buster v. Newkirk*, 20 Johns. 73. However, this was not the *ratio decidendi*. The court held for the fisherman upon the ground that the owner had lost his property by the very loss of possession.

The ruling of the court represents the usual statement of the law of property in wild animals that remain undomesticated. *Goff v. Kilts*, 15 Wend. 550; *Ulery v. Jones*, 81 Ill. 403. The old writers assume that as ownership in animals *feræ naturæ* is acquired by taking possession, the property is always contingent upon the maintenance of an actual possession. The further ancient rules that such animals remain property when beyond manual control *animo revertendi*, and their young, always, *ratione impotentia*, seem not even exceptions to that general principle. Bracton, liv. 2, c. i.; Institutes, liv. iv. Tit. 9. Now, the usual title gained by possession is not defeasible by the mere loss of possession. Again, this ancient rule limiting the rights of ownership in animals *feræ naturæ* seems inconsistent with the related law governing the responsibility of owners for injury done by such animals. Where a bear slipped his collar and in his escape to the woods injured a man, the court held the owner liable as a matter of course. *Vredenburg v. Behan*, 33 La. Ann. 627. The one limitation that has been suggested is that when the animal reaches its native place or an environment specially adapted to its existence, liability should cease. This points to a practical distinction between indigenous and imported animals — liability for the one may cease upon loss of possession, not for the other.

It would seem that the same law should govern the extent of the responsibility for animals *feræ naturæ* and the rights of property in them; and it is to be regretted that an express dictum in the principal case insists upon the ancient rule. If in the principal case the interruption of the owner's possession had been momentary, it would be hard to hold that

a fisherman taking possession the next moment thereby had the title. Large amounts of capital are to-day invested in wild animals imported for exhibition, and grave injustice may some time arise from a strict application of the ancient rule.

THE PAROL EVIDENCE RULE AGAIN. — The following communication contains additional facts regarding the case of *In Re Root's Estate*, where the Supreme Court of Pennsylvania reversed the decision of the Orphans' Court on the ground that it was error to admit evidence of the testator's intention.

"By way of supplement to the note in the November number of the REVIEW (p. 210), on 'The Parol Evidence Rule as Applied to Wills,' it may be added that in the case commented on (Root's Estate, 40 Atl. Rep. 818; S. C. 187 Pa., 118), the Court ignores, and the report fails to mention, the fact that the will itself, as will be seen from the following extract, shows that the testator spoke of his wife's nephews as 'my nephews': — 'And . . . after the decease of my said dear wife, I do give . . . : Unto my wife's cousin, M. L. Greer, . . . \$6000; unto my nephew, William Root, . . . \$1000; unto my nephew, George Clayton, . . . \$1000; unto my wife's sister, Sarah Root, . . . \$1000; unto my nephew, Henry Sheppard, . . . \$1000; unto my nephew, John Sheppard, . . . \$1000.'

"Of the persons thus described as 'my nephews,' George Clayton was his nephew, while Henry Sheppard and John Sheppard were, admittedly, the nephews of his wife: whether, therefore, the 'William Root' intended was actually his nephew of that name, or the William who was his nephew only in the sense in which the two Sheppards were, was the question; and in the court below, the matter having, under exceptions to the original adjudication, been referred back to the Auditing Judge for inquiry upon this point (Legal Intelligencer, February 5th, 1897, 6 District Rep., 78), it was found from the evidence that of the two persons to whom, in the sense indicated by the will, the language was equally applicable, William Root, the wife's nephew, was the one intended, and the legacy was accordingly awarded to him."

These facts show an unusual combination of circumstances. Had there been two true nephews named William Root it has long been settled law that the testator's declarations of intention would be admitted. This would be a case where, in the dictionary meaning of the words, the will applies exactly to two persons. The principal case differs in that one of the William Roots was a wife's nephew, and that the dictionary meaning of the words would point to but one of the William Roots and exclude the other. But when the entire will is examined — as it undoubtedly may be in such a case — it appears that the testator was not using the term "my nephew" in its strict dictionary sense, but indiscriminately, as meaning either "my nephew," or "my wife's nephew." That is, if the will is used as a dictionary and the testator is made his own interpreter, it appears that he attached a meaning to the phrase "my nephew" which was equally applicable to either William Root, and that, accordingly, there were here two persons who in the light of the whole instrument exactly filled the description. Whether there is sufficient difference between this case and the case of two real nephews of the same name to warrant the exclusion here of the declarations of intention is a question which, until the present case, has apparently never come before a court. It is accordingly the

more to be regretted that the point was not discussed. On the one side it might be truly said that the rule regarding declarations of intention is an iron-bound product of centuries, and not to be extended in courts of law beyond the exact case of two persons or things each meeting the description equally well. See Thayer, Preliminary Treatise on Evidence, pp. 417-445. On the other side the cases appear to be substantially the same, for words are but emblems of meaning, and their meaning here as indicated by the testator himself applies equally to the two persons. When the case is thus analyzed the distinction really seems "a distinction without a difference."

ACCESSION OF PROPERTY.—Where a substance is the product of the labor or property of two individuals, its ownership is a question to be determined by the rules of accession. Some courts have made the right of the injured party to claim the new article depend on the question whether the identity of his original materials can be made out by the senses. Such and other arbitrary distinctions based on mere physical reasons were wisely discarded by a more modern case. When the title to the new article is the point in issue, the first question must be, how much has each party contributed to make it what it is. If the converter by his labor has increased the value of the plaintiff's goods so greatly that it appears grossly unjust to deprive him of the new product, the former owner is precluded from appropriating it. On such reasoning as this Judge Cooley in *Wetherbee v. Green*, 22 Mich. 311, decided that an increase in value of twenty-eight times was sufficient to vest title in the taker. Such a ruling naturally leaves to the discretion of future courts the question of the exact ratio at which the balance will turn and the labor of the converter will belong to the owner of the goods. The case of *Eaton v. Langley*, 47 S. W. Rep. 123 (Ark.) supports the principles of *Wetherbee v. Green*. The defendant by mistake cut down the plaintiff's standing timber, and worked it into cross-ties. A resulting increase in value of six times the court held not sufficient to vest the title to the new product in the defendant. There was no contention that bad faith entered into the transaction, and it was not necessary for the court to discuss the questionable doctrine of *Silksbury v. McCoon*, 3 Comst. 378, that a wilful converter can never avail himself of the doctrines of accession.

If it is the object of the law to establish justice between the parties, why not hold them tenants-in-common in proportion to their respective contributions, instead of giving the whole mass to one or the other? The plaintiff, it may be argued, would then be fully compensated, without the defendant being unnecessarily punished. Such a result is recognized by the courts in the closely analogous subject of confusion of goods. The answer to this reasoning seems to be found in the distinction between accession and confusion. In the latter case the mass, being of the same nature as its original materials, is easily divisible. In the former the new product is rarely incapable of partition without its resulting destruction. In confusion the volume of the mixture being readily ascertainable by weight or measure, the rights of the parties are susceptible of easy adjustment, each taking the share of the whole which the law gives him. In accession, if both the converter and the injured party are to be given legal interests in new product, the principles of tenancy in common preclude the plaintiff from ever obtaining the chattel or any part of it. He is com-

pelled against his will to become a tenant-in-common out of possession. There seems, therefore, to be no escape from the doctrine of *Wetherbee v. Green*. Whether the actual result reached in the principal case is a correct one may still be doubtful. At a ratio of six to one the scales nearly balance.

DONATIO MORTIS CAUSA. — In the case of *Liebe v. Battman*, 54 Pac. Rep. 179, the Supreme Court of Oregon had occasion to apply to exceptional, as well as notorious facts the rule that a *donatio mortis causa* requires delivery. It appeared that one about to commit suicide indorsed a promissory note, sealed it in an envelope directed to a friend with whom he was living, and placed the envelope, together with a letter to the same friend, upon a table beside his bed. Then he shot himself. The friend came quickly from his room in an opposite part of the house, but the dying man, without further reference to the gift, soon passed into a comatose state from which he never rallied. It was held there had been no delivery in spite of the fact that the friend had picked up the envelope before the donor died, though after he became unconscious. The Court said, "There must be a parting with the dominion over the subject-matter of the gift with a present design that the title shall pass out of the donor and to the donee." The definition and the application of it seemed sound. Placing the addressed envelope on the table where it was directly at the hand of the donor could not amount to a giving up of dominion, and though possibly there was a change of possession before the death that was not enough. A transfer, a positive act of giving, a parting with dominion, — these require a corresponding intent which the unconscious man could not have had. *Leonard v. Administrators of Kebler*, 50 Ohio St. 444.

The facts suggest another case far more difficult, — where the document is mailed by the man about to die, but he becomes unconscious before it is actually received. There, with full intent, he has actually set in motion the machinery which was to complete the gift, has done all in his power, and has put the document beyond recall, actually outside of his own dominion. The technical requisite, possession in the donee, alone is lacking. The cases of gifts *inter vivos* where a delivery to A for B is held a good delivery to B are clearly in point, but it must be remembered that these decisions are not harmonious and that the courts might be loath to apply the relaxation of the law *inter vivos* to the *donatio*. The caution that led the Roman law to require five witnesses to perfect a gift in fear of death still lingers in our law and causes not only suspicion and strict scrutiny, but occasionally, at least, a tendency to cramp the rights of the donee.

THE USE OF ADJECTIVES IN TRADEMARKS. — An interesting phase of trademark law, so important in the present state of business competition, was presented last August to the Court of Chancery of New Jersey in *Levi v. Schoenthal*, 41 Atl. Rep. 105. The complainant owned a laundry styled, "Incomparable Laundry," and sought to enjoin his former employé from using the same adjective in advertising a rival business of precisely similar nature. A preliminary injunction was refused because of the complainant's laches; but the court, without committing itself, indicated clearly its line of thought on the point of

trademarks. To grant an injunction on this ground, it says, would be to do the great injustice of allowing one, who has asserted the excellence of his product, to exclude all his business rivals from using the same terms with equal truth; in short, it would be a prohibition of the use of the English language.

This view is certainly commendable. To acquire a right in a term as a trademark, it must be significant of the origin of the goods to which it is attached, and designed with the purpose of distinguishing them from articles of a like manufacture. These qualities coupled with priority of appropriation give a right to its exclusive use. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460. The adjective in the principal case, which at best is only indicative of class or grade, is the property of all mankind, not subject to individual monopoly. A close analogy may be drawn from the use of geographical names which have never been regarded as subjects of private pre-emption. *Eastman Photographic Materials Co. v. Compt. Gen. of Patents, etc.*, 79 L. T. Rep. 195.

In some cases of trademarks suggestive of locality we find equity taking jurisdiction. It is not, however, on the ground of protecting any right in the label, though that may be the practical result. There is a sharp distinction between cases where a geographical name has been claimed as a trademark, and where it has, through long continued application to a certain class of goods, become a standard of superior excellence. In the latter case equity will restrain one living at a different place from fraudulently using such brand to the detriment of him whose business has gained peculiarly the public confidence. *Pillsbury-Washbourne Flour Mills Co. v. Eagle*, 86 Fed. Rep. 608. Here the jurisdiction of equity is based on a tort in the nature of fraud, closely analogous to the common law action of deceit, with this distinction,—the complainant is protected, not because he has been deprived of something which was his, but because what would otherwise have fallen into his pocket has been diverted by the defendant. The damage, too, is continuous and difficult of computation. The object being to suppress unfair competition without unduly restraining trade, wide discretionary control is necessarily vested in the courts. This power, however, could not be strained to the extent of prohibiting, where no fraud appears, the use of a familiar adjective, indicative of quality, which could be used truthfully by innumerable business competitors.

FEDERAL JURISDICTION OVER CORPORATIONS.—Shareholders in a company, on being incorporated in two different States, become members of two distinct corporations. Failure to follow this principle led to a doubtful decision in the recent case of *Taylor v. Ill. Cent. R. R. Co.*, 89 Fed. Rep. 119 (Cir. Ct. Ky.). A Kentucky statute provided that foreign corporations could not do business within the State without first going through certain formalities of incorporation and thereby becoming domestic corporations, "citizens of Kentucky." The defendant, then an Illinois corporation, complied with this statute. For negligence in the course of its business in Kentucky it was sued in a Kentucky court by a citizen of that State, and obtained a removal to the federal court. This removal has now been upheld on the ground that, for the purposes of this action, the corporation was still, roughly speaking, a citizen of the State of Illinois.

One would have thought it settled by *Chicago & Northwestern Ry. Co. v. Whitton*, 13 Wall. 270, that, from the point of view of federal jurisdiction, such a corporation is looked upon in every respect as belonging to the State within whose limits the action in question is brought. Strange as it may seem that the same stockholders are conclusively presumed in Illinois to be citizens of Illinois and in Kentucky to be citizens of Kentucky, this paradox is no stranger than is the conclusive presumption in any State that the shareholders in its corporations are citizens, when in fact they are not. And the proposition of *Whitton's* case is equally true whether the incorporation in the State where the action is brought took place at the same time as in another State, or at a subsequent time. The acts in either case were wholly distinct, and the resulting corporations are two, not one. If this is true, the defendant was a Kentucky corporation so far as the present action was concerned, and the federal court had no jurisdiction.

The only decision of the Supreme Court of the United States which trenches upon the theory here laid down is *St. L. & S. F. Ry. Co. v. James*, 161 U. S. 545. The defendant corporation in that case was first incorporated in Missouri, and later in Arkansas. The plaintiff, too, was a citizen of Missouri, and sued upon a cause of action arising in Missouri, in the federal court sitting in Arkansas. He sued the railroad as an Arkansas corporation. The whole matter was so extreme, so palpable the subterfuge, that the court may well have hesitated. They may well have deemed it improper in such a case for a citizen of the first State to use the new incorporation as a stepping-stone to the federal courts. Stress is laid in the opinion on the fact that not only was the plaintiff a citizen of the State where the stockholders first became a body corporate, but the cause of action arose there as well. On this ground the case of *Chicago & Northwestern Ry. Co. v. Whitton*, *supra*, is distinguished. A careful reading of the opinion reveals no intention on the part of the court to overrule a case, which is cited with approval — *M. & C. R. R. Co. v. Alabama*, 107 U. S. 581 — where the facts were similar to the principal case, the precise question was expressly discussed, and the opposite conclusion reached. The only modification of the accepted rule intended by the court was in a suit obviously collusive. The rule was left intact that a corporation such as the present one belongs to the second State for the purposes of actions brought by citizens of that State upon causes of action arising within its limits.

RECENT CASES.

BANKRUPTCY—EFFECT OF NATIONAL ACT UPON STATE INSOLVENCY LAWS.—The United States bankruptcy law declares that the act shall go into full force and effect upon its passage, but provides that no voluntary petition shall be filed within one month, and no involuntary petition shall be filed within four months from that time. *Held*, that the act superseded State insolvent laws from the date of its passage. *Parmenter Mfg. Co. v. Hamilton*, 51 N. E. Rep. 529 (Mass.).

The previous United States bankruptcy act of 1867 was generally construed so as to permit actions under the State insolvency laws during the period which elapsed between the passage of the law and the date when petitions could be filed. *Day v. Bardwell*, 97 Mass. 246; *Martin v. Berry*, 37 Cal. 208. The different conclusion reached in the principal case was based largely upon the construction of the words,

not contained in the former act, that the law should go into full force and effect upon its passage. This clause is taken to indicate the intention of Congress that the law should go into general operation before proceedings could be commenced under it. Since every law becomes operative upon its passage, the declaration in the present act that it should at once have full force and effect would be entirely meaningless unless this construction is adopted. The case is likely to be followed in other jurisdictions.

BILLS AND NOTES — FORGED INDORSEMENTS. — The drawer of a check handed it to A. to deliver to the payee. A., however, forged the name of the payee and made delivery to the defendant, who took for value and without notice of the forgery. In like ignorance the plaintiff, the drawee, then paid the amount of the check to the defendant. In an action to recover back the amount paid, *held*, that the plaintiff is entitled to judgment. *First National Bank v. Farmers' & Merchants' Bank*, 76 N. W. Rep. 430 (Neb.). See NOTES.

BILLS AND NOTES — TRANSFER — NOTICE. — The defendant made a promissory note but had a personal equitable defence to any action thereon by the payee. The payee then indorsed the note to the plaintiff. *Held*, that the defence is not available against the plaintiff if he received the note in good faith, though he had sufficient notice to put a reasonable man upon inquiry. *Mulberger v. Morgan*, 47 S. W. Rep. 379 (Tex., Civ. App.); *Lehman v. Press*, 76 N. W. Rep. 818 (Iowa).

The cases are in agreement with the great majority of decisions and express the better view. See 12 HARV. LAW REV. 213.

CONSTITUTIONAL LAW — ANTI-TRUST ACT. — *Held*, that the United States Anti-Trust Act is constitutional and prohibits any combination among competing railroad companies engaged in interstate commerce to establish and maintain rates, whether the rates are unreasonable or not. *United States v. Joint-Traffic Ass'n*, 19 Sup. Ct. Rep. 25.

In construing the statute the opinion reaffirms the doctrine of *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; 11 HARV. LAW REV. 51, 126. See Prentice and Egan, Commerce Clause, 317. It also carefully limits its application to contracts, the direct and immediate effect of which is to restrain interstate commerce. Compare *Hopkins v. U. S.*, 19 Sup. Ct. Rep. 40; 12 HARV. LAW REV. 278; *Anderson v. U. S.*, 19 Sup. Ct. Rep. 50. The case is especially noteworthy, however, as deciding for the first time the constitutionality of the statute as previously interpreted. There is great difference of opinion on the point, but the decision is probably correct. The act is authorized by the power of Congress to regulate interstate commerce, unless it is forbidden by the fifth constitutional amendment as depriving persons of liberty without due process of law. However "liberty" is construed, the statute is valid unless it is not due process of law, and it is hardly oppressive and arbitrary enough to be held void on that ground. The prohibition of agreements thought to be dangerous to public welfare has been common in legislation from the earliest times; if Congress deem it advisable to forbid all combinations to fix interstate commerce charges in order to prevent those combinations which are injurious, the courts are not called upon to interfere. *Powell v. Pennsylvania*, 127 U. S. 678. See 11 HARV. LAW REV. 80.

CONSTITUTIONAL LAW — CRIMINAL LIABILITY — ACTS DONE UNDER AN UNCONSTITUTIONAL STATUTE. — A statute repealed a law which imposed upon the defendants, who were public officers, a certain duty, the neglect of which was criminal. *Held*, that the defendants are not indictable for the neglect of such duty, if they relied upon the repealing statute, *bona fide* believing it to be constitutional, although it was afterwards declared unconstitutional by the courts. *State v. Godwin*, 31 S. E. Rep. 221 (N. C.).

The case seems to be correct on principle, although there is a direct conflict of authority on the question. Many jurisdictions hold that when a legislative enactment proves to be invalid, it is, for all legal purposes, as if it had never existed; and, before it has been declared unconstitutional by the courts, acts done or duties neglected by a public officer, *bona fide* believing it to be valid and in reliance upon it, are, according to the general rule, not excused by his ignorance of the law. *Sumner v. Beeler*, 50 Ind. 341; *Campbell v. Sherman*, 35 Wis. 103. The better and more just doctrine, however, appears to be that the officer is protected unless the statute relied upon appears on its face clearly unconstitutional. *Henke v. McCord*, 55 Iowa, 378; *Sessums v. Botts*, 34 Tex. 335.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — ANTI-TRUST ACT. — Appellants were members of the Kansas City Stock Exchange, a combination of commission merchants engaged in selling on commission the live stock received at the stockyards of Kansas City. They drew up rules limiting rates to be charged, and further regulating the business. *Held*, that this combination is not a restraint of trade within the Anti-Trust Act of 1890, since it does not directly concern interstate commerce. *Hopkins v. United States*, 19 Sup. Ct. Rep. 40. See NOTES, 12 HARV. LAW REV. 278.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — POLICE POWER. — Defendant purchased liquor in North Carolina and proceeded to transport it in a buggy to his home in South Carolina. He was arrested in the latter state and convicted under a statute which provided that any person handling and hauling contraband liquors in the night-time should be guilty of a misdemeanor. *Held*, that such statute is not unconstitutional, as permitting an interference with interstate commerce. *State v. Holleyman*, 31 S. E. Rep. 362 (S. C.).

The decision is by an evenly divided court. It is contended by one of the judges who upheld the conviction that although there is an interference with an interstate commerce transaction, yet it is permitted by the "Wilson Bill." This, however, seems unsound. By the provisions of that act, each State is given the power to make laws affecting goods upon their arrival within the state, and the opinion of the dissenting judges that such goods are not subjected to state laws until they reach the consignee at their destination seems to be in consonance with the construction of the United States Supreme Court. *Rhodes v. Iowa*, 170 U. S. 412, 420. Still, the case may be supported upon the view taken by another of the judges, namely, that defendant was not engaged in an interstate commerce transaction. It would scarcely be contended that a person who is travelling home with a suit of clothes which he has purchased in a neighboring state, could claim to be engaged in interstate commerce, and the position of the present defendant is strictly analogous. It is conceded that the statute in question is a valid exercise of the police power.

CONSTITUTIONAL LAW — SIDEWALK ORDINANCE — REMOVAL OF SNOW. — A city ordinance required every occupant or owner of property to keep the snow removed from the sidewalk adjoining his premises. *Held*, that such an ordinance is unconstitutional since it imposes unequal burdens, and is equivalent to unequal taxation and to a taking of property without due process of law. *State v. Jackman*, 41 Atl. Rep. 347 (N. H.).

The case well illustrates the petty views of the scope of the great constitutional guarantees here invoked, which some courts insist on holding and applying with such mistaken zeal. The decision is supported by *Gridley v. Bloomington*, 88 Ill. 554, and by *Chicago v. O'Brien*, 111 Ill. 532, but it is nevertheless erroneous. The ordinance is an eminently fair and just one, not at all arbitrary or oppressive. It provides an equitable method of apportioning the burden of a public duty among the class of citizens most interested in its performance, and so situated as to be able most conveniently to attend to it. See *contra* to the principal case, *Goddard, Petitioner*, 16 Pick. 504; *Carthage v. Frederick*, 122 N. Y. 268; *Reinken v. Fuehring*, 130 Ind. 382. The reasoning of Shaw, C. J., in the first of these cases, seems unanswerable. There is really no taking of property, no taxation. The regulation is simply an exercise of ordinary police powers.

CONSTITUTIONAL LAW — TAXATION — PATENTS. — In taxing the capital stock of a corporation, patent rights owned by the company were included. *Held*, that this was error, for patent rights are not subject to State taxation. *People v. Board of Assessors*, 51 N. E. Rep. 269 (N. Y.).

A state law taxing shares of stock in a corporation provided that the value of the shares should be determined by making certain deductions from the aggregate value of the capital stock and dividing the residuum by the number of shares. *Held*, that patent rights owned by the company can be included in assessing the aggregate value of the capital stock. *Crown Cork & Seal Co. v. State*, 40 Atl. Rep. 1074 (Md.).

The latter case contains a *dictum* to the effect that patent rights are directly taxable by the State, but the opinion of the New York court upon this question seems quite correct. It may be conceded that a tax on patent rights is not levied upon the agencies of the Federal government within the rule in *McCulloch v. Maryland*, 4 Wheat. 316, and it is undoubtedly true that the patented articles are completely subject to State legislation. *Patterson v. Kentucky*, 97 U. S. 507. Yet, the principle of the supremacy of Federal laws within their constitutional sphere requires that the incorporeal right to exclude others from using the invention, being derived from the laws of the United States, should not be abridged by State taxation. To this effect is the weight of authority. *In re Sheffield*, 64 Fed. Rep. 833. But see *People v. Campbell*, 138 N. Y. 543, 547.

In the Maryland case, however, the tax was laid not on the capital stock but on the shares thereof. This distinction is technical but sound, and is established by authority. 2 Cook, Corporations, 4th ed., §§ 561, 563, 568. Consequently, admitting that capital stock consisting of patent rights is non-taxable, the shares should not be included in the exemption. Cf. *Shelby Co. v. Union, &c. Bank*, 161 U. S. 149. It is, apparently, immaterial that non-taxable property is taken into consideration in reckoning the amount of a tax on legitimate subjects. *Society for Savings v. Coite*, 6 Wall. 594. Therefore, the recent decisions in New York and Maryland are reconcilable, and both are in accordance with principle.

CONTRACTS — COMPROMISE — CONSIDERATION. — The defendants promised the plaintiffs to perform a certain railroad reorganization agreement. The alleged consideration for that promise was that the plaintiffs, the reorganization committee, should discontinue certain litigation pending against the defendants. In an action to enforce the contract, *held*, that this forbearance to press a disputed claim constitutes a good consideration. *Cox v. Stokes*, 51 N. E. Rep. 316 (N. Y.). See NOTES, 12 HARV. LAW REV. 276.

CONTRACTS — EXECUTORS AND DEVISEES. — At the death of testator certain houses contracted by him to be built on his land were not completed. The executor attempted to rescind the contract in the interest of the personal estate. In an administration suit, *held*, that the devisee of the land is entitled to have the work completed at the expense of the personal estate. *In re Day*, [1898] 2 Ch. D. 510.

The question here presented seems not often to have been considered by the courts. In general the executor has the legal power to dispose of his testator's surviving contracts at his discretion for the best interests of the estate. Schouler, Execs. and Adms., § 251; Woerner, Adms., 791. A clear distinction seems possible, however, between surviving contracts which were entered into for the permanent benefit of the inheritance, and those, the principal object of which was a personal benefit to the testator, which object is immediately defeated by his death. The former class, including the contract in the principal case, should be performed as intended by the testator, while the latter seem not properly subject to a claim of the heir or devisee of the land. *Gray v. Hawkin's Admr.*, 8 Ohio St. 450.

CRIMINAL LAW — LARCENY — FIXTURES. — *Held*, that copper boxes connected with a still in such a way as to make them part of the freehold are subjects of larceny. *Clement v. Commonwealth*, 47 S. W. Rep. 450 (Ky.).

This decision is plainly at variance with the common law. At the common law things that in any way savored of realty were not the subjects of larceny. The case rests upon the authority of an earlier Kentucky decision, *Smith v. Commonwealth*, 14 Bush. 31, in which it was held that the taking of chandeliers attached to gas pipes in the wall of a house, with intent to steal, was larceny, although the same court has held, contrary to the weight of authority, that such chandeliers are real estate. *Johnson v. Wiseman*, 4 Met. 357 (Ky.). The decisions can only be regarded as judicial legislation upon a subject which would better have been left to statutory regulation.

EQUITY — POLITICAL PARTIES — JURISDICTION. — A bill in equity was filed to restrain a chairman of a county committee of a political party from erasing from the roll of such committee the names of duly elected members. *Held*, that the bill should be dismissed. *Kearns v. Howley*, 41 Atl. Rep. 273 (Pa.).

It is generally agreed that equity has no jurisdiction to interfere in the internal affairs of a voluntary association, even where the duties and obligations of members are regulated by contract, unless property rights are involved. Kerr, Injunctions, 3d ed., 564. Cf. *O'Hara v. Stack*, 90 Pa. St. 477. The present case is even stronger; for defendant was clearly under no contractual obligation to plaintiffs on which the bill might be founded. The great difficulties in the way of judicial interference in such a case furnish an additional reason for the refusal to entertain jurisdiction. 2 Story, Equity Jurisprudence, 13th Ed., 263. Cf. *Graves v. Graves*, 13 Ir. Ch. 182.

EQUITY PROCEDURE — PLEAS. — The defendant in a suit in equity filed a plea setting up, in bar of the suit, matter already alleged in the bill. *Held*, that the plea is bad, since the objection should have been taken by demurrer. *Davis v. Davis*, 41 Atl. Rep. 353 (N. J., Ch.).

This unquestionable decision follows from the very nature of a plea in equity, which is to set up new matter. In early times this principle was carried so far that negative pleas were not allowed. Langdell, Equity Pleading, § 102. If a defendant could thus reiterate facts alleged by plaintiff, the latter might take issue on the plea, and then the absurdity would be presented of a party traversing an allegation which he had already admitted on the record. For the civil law maxim, *qui ponit fatetur*, prevails also in equity.

EVIDENCE — CONFESSIONS. — On a trial for murder, certain statements of the prisoner, made to a public officer, were admitted in evidence. The officer told the prisoner that he need not say anything unless he wished to, and that what he said might be used for him or against him. On exceptions, *held*, that the evidence was properly admitted. *Roessel v. State*, 41 Atl. Rep. 408 (N. J., C. A.).

The general rule is well settled that confessions can never be admitted in evidence when the prisoner in making them has been in the slightest degree influenced by any threat or promise of favor as regards the trial, if such threat or promise is made by an officer of the State. *Bram v. U. S.*, 168 U. S. 532. It has been decided that a mere

statement that what the prisoner said might be used against him does not invalidate a confession, as no threat is implied. *Reg. v. Baldry*, 2 Den. C. C. 430. The principal case goes a step further; yet it is only by putting a very strained construction on the words that one can find any threat or promise implied in them. The words merely state that what the prisoner said would be put in evidence, and the court seem very properly to have held that this did not invalidate the confession.

FEDERAL JURISDICTION — CORPORATIONS. — A Kentucky statute provided that no foreign corporation should do business within the State without first complying with certain rules and becoming a corporation of Kentucky. Defendant was an Illinois corporation, and complied with the Kentucky statute. On being sued in Kentucky, by a citizen of that State, it obtained a removal to the federal court. On a motion to remand, *held*, that the defendant is, for the purposes of federal jurisdiction, a "citizen" of Illinois, and as such is entitled to have the action tried in the federal court. *Taylor v. Ill. Cent. R. R. Co.*, 89 Fed. Rep. 119 (Cir. Ct., Ky.). See NOTES.

INTERNATIONAL LAW — BREACH OF BLOCKADE. — A steamship was brought to ten miles to the northeast of a blockaded port and formally warned away. Four hours afterward she was captured seventeen miles to the northwest of the port. *Held*, that this loitering before a blockaded port was a breach of the blockade. *The Newfoundland*, 89 Fed. Rep. 99, 510 (Dist. Ct., S. C.). See NOTES.

LIBEL — SUFFICIENCY OF PUBLICATION. — A manager of a corporation, in connection with its business, dictated a libellous letter to a stenographer in the corporation's employment, who copied and mailed the same to plaintiff. *Held*, that the dictation, copying, and mailing constituted but a single act of the corporation, and did not amount to a publication of the letter. *Owen v. Ogilvie Pub. Co.*, 53 N. Y. Supp. 1033 (Sup. Ct., App. Div., Second Dept.).

The reason given for the decision is that a corporation ordinarily requires the action of both the manager and the stenographer to produce a letter and therefore the whole transaction constituted but the act of writing, thus precluding any separate communication to the stenographer. The argument is somewhat finely drawn, and it is difficult to appreciate any distinction because of the fact that the acting parties were the servants of a corporation rather than of a private individual. The court makes no mention of the case of *Pullman v. Hill*, [1891] 1 Q. B. 524, where the dictation of a letter by the manager of a firm to a stenographer was held to be a sufficient publication. See also *Boxsius v. Frères*, [1894] 1 Q. B. 842. *Pullman v. Hill*, *supra*, has been criticised on the ground that there could be no publication, since, when the letter was dictated there was no libel in existence. The mere uttering of words, although at the time it is intended that they should be written down, does not constitute libel but may constitute slander. Odgers, Libel and Slander, 174. If this criticism is sound, it affords a possible ground on which to support the principal case.

PLEADING — STATUTE OF LIMITATIONS. — Defendant demurred to a declaration in *assumpsit* which showed that the cause of action arose more than six years previous. *Held*, that the declaration did not state a good cause of action. *Crow v. Board of Commissioners of Grant County*, 54 Pac. Rep. 880 (N. Mex.).

The phraseology of the Statute of Limitations merely indicates that a defence is given to the defendant in a certain event, and not that the plaintiff has no cause of action. As early as the time of Charles II. it was decided that to take advantage of the statute it must be specially pleaded. *Puckle v. Moor*, 1 Ventris, 191. Chitty says that it is no objection to the declaration that the day of the promise appears to have been more than six years before the commencement of the action. Chit. Pl., 16th Am. ed., 273. Where the plaintiff relies on a waiver of the statute, he declares on the original cause of action and interposes the waiver by way of replication to the defendant's plea that the statutory period has run. *Isley v. Jewett*, 3 Met. 439 (Mass.). If the defendant were allowed to demur to the declaration he could still prevent recovery although he had waived his defence. The principal case is contrary to the weight of authority, and seems indefensible on principle. 1 Saund. 283, note (2); Chit., Pl., 16th Am. ed. 506.

PROPERTY — ACCESSION — RELATIVE VALUES. — Defendant, an innocent trespasser, cut down the plaintiff's standing timber, and converted it into cross-ties. The value of the timber was thus increased six times. In an action of replevin, *held*, that the increase in value is not sufficient to entitle the defendant to the cross-ties. *Eaton v. Langley*, 47 S. W. Rep. 123 (Ark.). See NOTES.

PROPERTY — ANIMALS FERÆ NATURÆ. — A sea-lion escaped from the control of its possessor, and was abandoned by him. A year afterward it was recaptured by a fisherman seventy miles from the place of escape. *Held*, that the qualified right of property in the former possessor was lost by the escape. *Mullett v. Bradley*, 53 N. Y. Supp. 781 (Sup. Ct., App. Term.). See NOTES.

PROPERTY — BOUNDARIES — ESTOPPEL. — A boundary line was run between the adjoining lands of plaintiff and defendant under a common misapprehension as to their legal rights, and was acquiesced in for five years. *Held*, that plaintiff is now estopped to assert his rights at law. *Pittsburg Iron Co. v. Lake Superior Iron Co.*, 76 N. W. Rep. 395 (Mich.).

It is undoubtedly true that a *bona fide* compromise of doubtful claims to land is binding on the parties. 1 Jones, Real Property in Conveyancing, § 354. But where no actual agreement has been made to accept a boundary line as final, it seems that an estoppel would not be raised against a party, who has acquiesced therein for less than the statutory period, unless he had been guilty of a false representation whereby the other party was misled. 1 Story, Equity Jurisprudence, 13th ed., §§ 385, 386; *junction Ry. Co. v. Harpold*, 19 Ind. 347, 350; *Haso v. Plauts*, 56 Wis. 105. In the principal case the parties erroneously supposed the boundary to be the true one and the plaintiff does not appear by his words or actions to have influenced the defendant's conduct. On these facts it is hard to see how the doctrine of estoppel can correctly apply. *Hill v. Epley*, 31 Pa. St. 331, 334; *Sandford v. McDonald*, 53 Hun, 263; *Proprietors of Liverpool Wharf v. Prescott*, 7 Allen, 494.

PROPERTY — COVENANTS — EQUITABLE EASEMENTS. — A grantor, in conveying land, reserved to himself and his heirs the minerals beneath its surface with the right to remove the same by any subterranean process; it was also provided that no mine or air shaft should be intentionally opened or any mining fixtures established on the surface of said land. The grantee divided the land into lots, some of which he conveyed to defendants, who, having also acquired title through the grantor to the reserved mining privileges, proceeded to sink a shaft and erect mining fixtures. In a suit by the original grantee for an injunction to prevent this, *held*, that the injunction should be granted. *Electric City Land and Improvement Co. v. West Ridge Coal Co.*, 41 Atl. Rep. 458 (Pa.). Three Judges dissenting.

The court went on the ground that the provision that no shaft should be opened or fixtures established was a covenant running with the land. It is difficult to support the case on this ground, because it is well settled that the burden in such a case does not run. *Cook v. Arundel*, 1 Abr. Eq. 26. The provision seems to be an equitable easement. As such it would bind all parties who took with notice of it. *Fielden v. Slater*, L. R. 7 Eq. 523. The original deed was registered and therefore the defendants had notice. However there was no covenant as to how the surface of the land was to be used. The provision as to the use of the mines was for the protection of the surface owner as against the owner of the coal beneath. It was not intended to restrict the owner of the surface in the use of his land and it did not contemplate the ownership of the mines and of a portion of the surface being united in one person. When the proprietor of the coal became also a surface owner the effect of the proviso was destroyed. The view of the minority seems the sounder one.

PROPERTY — DONATIO MORTIS CAUSA. — One about to commit suicide indorsed a promissory note to the defendant, sealed it in an envelope addressed to the defendant, and placed it on a table beside his own bed. Then he shot himself. The defendant discovered and picked up the note while the donor was alive but unconscious. *Held*, that there was no delivery to defendant. *Liebe v. Battmann*, 54 Pac. Rep. 179 (Oreg.). See NOTES.

PROPERTY — EASEMENTS — REVIVAL. — Plaintiff and defendant were owners of adjoining buildings with a party wall between. Plaintiff had an easement in a stairway upon the defendant's premises, next to the party wall. The buildings were totally destroyed by fire. Upon a reconstruction of the buildings, with the stairway in the same location, *held*, that the easement revived. *Douglas v. Coonley*, 51 N. E. Rep. 283 (N. Y.).

A similar question appears never to have arisen in England or America. The analogies of the law of easements do not support the decision. The easement was not merely suspended, but wholly extinguished. *Shirley v. Crabb*, 138 Ind. 200. And it is the general rule that easements once extinguished can be created anew only by grant or prescription. *Barlow v. Rhodes*, 1 C. & M. 439. The defendant was under no obligation to join with the plaintiff in rebuilding the party wall, nor was he under any duty to reconstruct the stairway. *Sherred v. Cisco*, 4 Sandf. 480. The mere fact that the new building and the stairway were constructed in the same location as the old does not seem to be a satisfactory reason for reimposing upon the servient owner a burden of which he had been relieved by the accident. The Court proceeds upon the ground of hardship to the plaintiff if the easement were lost but it is equally as hard upon the defendant to compel him to again submit to the burden, although he could not have complained so long as the original right existed.

PROPERTY — PRESCRIPTION — HIGHWAYS. — *Held*, that the uninterrupted adverse use of a private road by the public for twenty years constitutes it a highway. *Blumenthal v. State*, 51 N. E. Rep. 496 (Ind.).

It is well settled law that the public may acquire a right of way by prescription. *Sprout v. Boston & Albany R. R. Co.*, 163 Mass. 330; *Blanchard v. Moulton*, 63 Me. 434. This is often put on the ground that adverse use for a certain period, varying in different jurisdictions, raises a conclusive presumption of a dedication of the road by the original owners and of an acceptance by the public authorities. *Fitchburg R. R. Co. v. Page*, 131 Mass. 391; *Reed v. Northfield*, 13 Pick. 94. It would seem more sensible, however, to base this rule of prescription on an analogy to the Statute of Limitations, as is now being generally done in this country. *Tracy v. Atherton*, 36 Vt. 503; *Wallace v. Fletcher*, 30 N. H. 434.

QUASI CONTRACTS — MISTAKE OF LAW. — Plaintiff, as executor, paid a legacy to an adopted child, erroneously believing her to be entitled to it by law. On discovering his mistake, plaintiff sued the child's guardian for the money. *Held*, that he cannot recover. *Phillips v. McConica*, 51 N. E. Rep. 445 (Ohio).

While money paid under a mistake of fact can generally be recovered, this case holds that there can be no such recovery when the mistake is one of law. The reason given for this distinction, namely, that ignorance of the law excuses no one, seems unsatisfactory, for the plaintiff does not ask to be excused for having injured any one, but merely that the defendant shall not be allowed to make an unjust gain out of the plaintiff's mistake. Where the mistake is one of fact, recovery is allowed because it is manifestly inequitable for the defendant to keep the money. This reason evidently applies just as strongly when the mistake is one of law, and there are a few cases supporting this view. *Mansfield v. Lynch*, 59 Conn. 320; *Culbreath v. Culbreath*, 7 Ga. 64. The great weight of authority, however, supports the principal case. *People v. Foster*, 133 Ill. 496; *Vanderbeck v. Rochester*, 122 N. Y. 285; *Carson v. Cochran*, 52 Minn. 67.

STATUTE OF FRAUDS — AFFIRMATIVE DEFENCE. — *Held*, that the Statute of Frauds is an affirmative defence. *Barnes v. Black Diamond Coal Co.*, 47 S. W. Rep. 498 (Tenn., Sup. Ct.).

Held, that the Statute of Frauds is available under the general issue. *Hillman v. Allen*, 47 S. W. Rep. 509 (Mo.).

Until the Judicature Acts it was uniformly held in England that the general issue raised this defence, and some American courts are in accord. *Reade v. Lamb*, 6 Ex. 130; *Birchell v. Master*, 36 Ohio St. 331; *Metcalf v. Brandon*, 58 Miss. 841. To support these decisions it is argued that the statute merely introduced a new rule of evidence, and that the defendant, under a denial of the contract, may object to parol proof of it. But in that case a memorandum, made after action begun, would be good evidence, whereas, in fact, it is inadmissible. *Bill v. Bament*, 9 M. & W. 36. By the weight of American authority the statute must be pleaded affirmatively. *Crane v. Powell*, 139 N. Y. 379; *City v. Manufacturing Co.*, 93 Tenn. 276. This view is supported on the ground that the enactment of the statute did not affect the nature of a contract, but only prescribed that such contracts as came within its provisions could not be enforced unless the statute was complied with; that, therefore, proof of the contract shows a legal right in the plaintiff which the defendant must prove is unenforceable. The result thus reached is believed to be correct.

TORTS — ACTION FOR DEATH — PLEADING. — Action by an administrator for negligently causing the death of intestate, who, as defendant's servant, was incurring, at the time of the injury, an extraordinary danger of the employment. *Held*, that it is not necessary for plaintiff to allege and prove that decedent was unaware of the danger, because the action is based on a statute in which no mention is made of contributory negligence. *Lexington, etc. Mining Co. v. Stephens' Admr.*, 47 S. W. Rep. 321 (Ky.).

The court recognizes the rule, previously laid down in Kentucky, that in an action by a servant against his master for an injury not resulting in death, and arising from an extraordinary risk of the employment, an allegation that the servant was unaware of the danger is necessary to a complete statement of his cause of action. See *Bogenschutz v. Smith*, 84 Ky. 342. The ground of distinction made in the principal case has not been generally adopted by the authorities. *Tiffany, Death by Wrongful Act*, §§ 63, 181. It would seem that on principle the same rules of pleading should apply, whether the action be brought by the servant himself in case he survives the injury, or by his administrator after death, inasmuch as both actions are founded on a violation of the same duty owed by the master to the servant at the time of the injury.

TORTS — IMPUTED NEGLIGENCE — PARENT AND CHILD. — The plaintiff, a child under the age of four, was injured by the negligence of the defendant, the negligence of the parent, in allowing the child to wander in the streets alone, contributing to the

injury. *Held*, that the negligence of the parent is imputable to the child so as to prevent recovery. *Juskowitz v. Dry Doc.*, etc. R. R. Co., 53 N. Y. Supp. 992 (Sup. Ct., Trial Term, N. Y. Co.).

South Covington, etc. R. R. Co. v. Herrklots, 47 S. W. Rep. 265 (Ky.), *contra*.

There is a direct conflict of authority on this point. Some jurisdictions hold that the parent or guardian is the agent of a child *non sui juris*, and in respect to third persons the contributory negligence of the parent or guardian must, on the theory of agency, be imputed to the child. *Hartfield v. Roper*, 21 Wend. 615; *Wright v. Malden, etc. R. R. Co.*, 4 Allen, 283. The relation between the child and the parent, however, cannot be that of principal and agent, as all the essential elements of agency are wanting, the child having no control over the acts of the parent, and no right to remove him from power or appoint another in his stead. The better opinion, therefore, seems to be that the parent's negligence should not be imputed to the child, and he should not be precluded from recovery against one tortfeasor, simply because others have contributed to cause the injury. *Newman v. Phillipsburg Horse Car Co.*, 52 N. J. Law, 446; *Robinson v. Cone*, 22 Vt. 213.

TORTS — MALICIOUS PROSECUTION OF CIVIL SUIT. — *Held*, that an action for the malicious prosecution of a civil suit will not lie where there has been neither arrest of person, nor seizure of property, nor other special injury. *Smith v. Michigan Buggy Co.*, 51 N. W. Rep. 569 (Ill.).

The question was squarely before the Illinois court for the first time, and after a full examination of the authorities a decision was reached which is probably contrary to the weight of American judicial opinion. *Clossur v. Staples*, 42 Vt. 207; *McCardle v. McGinley*, 86 Ind. 538. The authority in accord with the principal case, however, is strong. *Wetmore v. Mellinger*, 64 Iowa, 741; *Muldoon v. Rickey*, 103 Pa. 110. The latter decisions must be put on the broad ground of public policy, and on that ground, it seems, ought to be supported. Allowing the action tends to increase useless and vexatious litigation, and one who honestly seeks redress through legal means should not be subjected to the probability of incurring another suit as a penalty for failure in his own. The successful defendant in a civil suit maliciously prosecuted suffers slight damage beyond the expense of the suit. He is reimbursed for this by way of costs, and if, as in most American jurisdictions, these do not cover his entire expense, that is a proper case for legislative action.

TORTS — PRIVATE ACTION FOR PUBLIC NUISANCE. — The defendants, a railroad company, were required by statute to maintain a draw in a certain bridge. Through the defendants' negligence, the draw fell and the plaintiff's ship was delayed several days, for which this action is brought. *Held*, that the plaintiff can recover for the delay. *Piscataqua Navigation Co. v. New York, etc. R. R. Co.*, 89 Fed. Rep. 362 (Dist. Ct., Mass.).

To entitle a person to bring a private action for a public nuisance, he must show that he has suffered special damage. The rule is often laid down that such special damage must differ in kind, and not merely in degree, from that which the rest of the public suffers. *Shaw v. Boston & Albany R. R.*, 159 Mass. 597; *Houck v. Wachter*, 34 Md. 265. It seems more in accordance with public policy, which must be the ultimate reason for allowing recovery in such cases, that if the plaintiff can show substantial damage he should be allowed to recover, even if the rest of the public have suffered the same kind of damage, though in an inappreciable degree. This is substantially the rule laid down in the principal case, and it certainly seems less artificial, and open to fewer objections, than the other. *Francis v. Schoelkopf*, 53 N. Y. 152; *Mayor v. Alexandria Canal Co.*, 12 Pet. 91.

TORTS — RAILROADS — DUTY TO TRESPASSERS. — *Held*, that employees in charge of a train passing through a city must keep watch for trespassers on the track. *Chesapeake, etc. Ry. Co. v. Perkins*, 47 S. W. Rep. 259 (Ky.).

The decisions on this point are in direct conflict. It has been held that employees of the railroad are under no duty toward the trespasser on the tracks until he has been discovered. *Wabash, etc. R. R. Co. v. Jones*, 163 Ill. 167; *Palmer v. Northern, etc. R. R. Co.*, 37 Minn. 223. There is abundant authority, however, in accord with the principal case, imposing on such employees the duty of keeping a lookout for trespassers in inhabited neighborhoods where they may be expected. *Whalen v. Chicago, etc. R. R. Co.*, 75 Wis. 654; *South, etc. R. R. Co. v. Donovan*, 84 Ala. 141. In Ohio, however, the court has gone a step further, and adopted what commends itself as the logical position. Here the rule of due care under the circumstances is applied to this case as to others, and holds that the engineer, consistently with his paramount duty towards the management of his train, must adopt ordinary precautions to discover danger to trespassers on the track. *Cincinnati, etc. R. R. Co. v. Smith*, 22 Ohio St. 227; *Pickett v. Wilmington, etc. R. R. Co.*, 117 N. C. 616.

TRUSTS — BREACH OF TRUST — *WETMORE v. PORTER*. — In an action by an executrix upon a promissory note, *held*, that evidence is inadmissible tending to show that the money for which this note was given was loaned by the executrix in a collusive attempt to defraud the estate. *Atwood v. Lister*, 40 Atl. Rep. 866 (R. I.).

The question, whether a trustee who has wrongfully disposed of trust property may maintain an action for its recovery as trustee has given rise to much difference of opinion. The decision in the principal case is in accord with the weight of authority. It is based upon the reasoning in *Wetmore v. Porter*, 92 N. Y. 76. See 12 HARV. LAW REV. 133.

REVIEWS.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By E. Parmalee Prentice and John G. Egan. Chicago: Callaghan & Co. 1898. pp. lxxv, 386.

Shifting tendencies and the general development of law — hard as they may be to treat in a condensed work — cannot with any propriety be left out of an exhaustive special treatise. This fact the authors of the present work realized, and they have carefully carried out the treatment of their special subject, historically and analytically. The book embodies an effort, in the main successful, to take the point of view of the Supreme Court of the United States in regard to the so-called "Commerce Clause," to show how this point of view has changed with time, and how it has varied in the manifold different classes of cases involving the power to regulate commerce.

The aim of the framers of the clause is shown in its true light. They meant to give Congress power to prevent one State from enacting tariffs discriminating against the others and from passing navigation laws. No one thought the federal control was made exclusive; in fact a provision to make it so was struck out by the convention. All this the authors concede. They justify the doctrine of exclusive federal control by the general development of the country in ways wholly un contemplated, accentuated by a change in the relation of the States after the civil war. p. 35. These are the best explanations which the school of Marshall adopt. To the school of Kent and Taney they are not so convincing.

In stating the modern rule, that the control of commerce belongs exclusively to Congress in all matters admitting of uniform treatment, the authors are right, p. 27; but they make an unfortunate slip in assuming that this was the rule laid down by Mr. Justice Curtis in *Cooley v. Wardens of the Port of Philadelphia*, 12 How. 299. The doctrine of that case was that federal control is exclusive in matters which admit *only* of uniform treatment. The misconception of that rule has been shared by the courts. The consequent broadening of the exclusive power restricted the States to such an impossible extent that considerable sophistry had to be evolved in support of some State laws by means of narrowing the definition of a "regulation" of commerce. Hence a drift back towards a broader rule. Though the cause is ignored, the effect is noted. p. 206. Indeed, the authors are somewhat inclined to admit the difficulty of saying that all the State regulations of carriers which have been upheld are not regulations of commerce. p. 164. Yet, granted the modern rule with its modifications, it is very justly treated in connection with a great number of different circumstances.

Nor is federal legislation about commerce neglected. The ancient "Preference Clause," the modern Interstate Commerce Commission, and the Anti-Trust Act of 1890 are considered. The last act, and its interpretation in the Trans-Missouri case, are discussed and condemned. The case of the Kansas City Live Stock Exchange is supported as decided in the lower court,—a little unlucky now that the decision has been reversed. See 12 HARVARD LAW REVIEW, 278. Finally the control of commerce with the territories and with Indian tribes is well reviewed. It is satisfactory to note that unlimited power over the territories is advocated, although the case cited does not wholly bear out the proposition, p. 305. *Endleman v. United States*, 86 Fed. Rep. 456. The chapter on Indians ends a work which, in view of the difficulty of the subject, deserves commendation. Not the least valuable result is in showing that all the cases cannot be reconciled.

J. G. P.

THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA. By Thomas M. Cooley. Third edition, by Andrew C. McLaughlin. Boston: Little, Brown, & Co. 1898. pp. li, 423.

The good taste of remodelling the text of a book written by another is somewhat open to question, but the editor of the third edition of Judge Cooley's admirable little book has sinned no more than was necessary from the nature of the course that he adopted. A sentence occasionally inserted, a new turn of phrase, have generally sufficed to bring the statements of the law into line with modern decisions. Constitutional law grows, as grow it must, and changes in wording were necessary in order to keep the book an authentic text book. Since the last edition appeared, the Supreme Court of the United States has passed for the first time on the citizenship of a Chinaman born of alien parents in this country, when he returns from a visit to China, and on the constitutionality of State legislation prescribing an eight hour limit to the laborers' day. Old rules, too, have put on new faces; as where the theory that only land and capitation taxes can be direct gave way to a decision that a tax on incomes might also be direct. All this, and more, the compiler of the new edition notes.

Two parts of the book are substantially rewritten. One of them is a new chapter on state constitutions, virtually a condensation of two chapters in Judge Cooley's *Constitutional Limitations*. The other is the chapter on the control of interstate commerce. The first edition dealt with the subject by merely discussing the successive decisions. As cases grew more numerous this method became impossible, and the editor takes the only other course possible, generalizing and referring to the cases. For this method the subject of interstate commerce is a mare's nest; and the shortcoming of the present treatment lies in the attempt to see in each case a part of a consistent whole. The reconciling of the recent refinements upon *Leisy v. Hardin*, 135 U. S. 100, is a thankless task. p. 77, note 2.

This natural desire to look upon the law as a present fixed code is the one flaw that mars the fairness of the editor's work. The important decisions above referred to, and more, are faithfully recorded. In a work of this size many cases must of necessity be discarded; lack of

space too may forbid much consideration of such vague things as tendencies. Yet one cannot but wish that attention were directed to the fact that the court in choosing the wide meaning of the term "liberty" did change its front. *Allgeyer v. Louisiana*, 165 U. S. 578. No mention is made of the latest phase of federal control of commerce, the Anti-Trust Act of 1890. And the *dicta* which led to so forcible a declaration—still *obiter*, it is true—in *Bram v. United States*, 168 U. S. 632, that an unwarrantably broad version of the Law of Confessions is a part of the Fifth Amendment, deserve at least to be noticed. J. G. P.

A SELECTION OF CASES ON THE LAW OF CONTRACTS. In two volumes. By William A. Keener. New York: Baker, Voorhis & Co., 1898. pp. xxv, 1830.

This collection of cases is concerned with developing the fundamental principles involved in the formation, performance, and discharge of simple contracts and contracts under seal. The reputation of the editor in the field of Quasi-Contracts leads one to expect a high standard of excellence in this collection; and, upon the whole, that anticipation hardly fails to be realized.

In regard to his selection of cases, it is true, the editor found the authority well sifted by Langdell's and Williston's Cases. But he always shows sound judgment in adding the later cases. His policy of printing the cases in full throughout cannot be too much commended. Chapter I—Formation of Contract—while most successful as a whole furnishes perhaps most opportunity to differ from the editor's judgments. The cases under Section I (a)—intention to contract—and (b)—effect of mistake—are new to case books and of fundamental importance. p. 1, p. 7. But under Section II—consideration—the selection is sometimes indiscriminating. Two notable exceptions to this criticism are *Jameison v. Renwick*, 12 Vict. L. R. 124, and *Bagge v. Slade*, 3 Bulstrode 162. The criticism, however, applies to (d)—performance of a contract obligation as consideration—where *Chichester v. Cobb*, 14 L. T. Rep. 433, which completes a most interesting trilogy of cases, with *Shadwell v. Shadwell*, 30 L. J. C. P. 145, and *Scotson v. Pegg*, 6 H. & N. 295, is not found; *Day v. Gardner*, 42 N. J. Eq. 199, might well replace the unintelligent case of *Myrick v. Giddings*, 1 Mack. (D. C.) 394. However, the two concluding cases of the subsection are very late and of first importance. *Abbott v. Doane*, 163 Mass. 433; *Arrand v. Smith*, 151 N. Y. 502. Again in a related section—beneficiary—the failure to include *The Trustees v. Anderson*, 30 N. J. Eq. 366, and *Crowell v. The Hospital*, 27 N. J. Eq. 650, in a connection with *Gifford v. Corrigan*, 117 N. Y. 257, is unfortunate. p. 769.

The compiler's arrangement is unquestionably the strongest element in the collection. This praise applies not only to the general plan and the arrangement and subdivision of the chapters, but to the logical sequence of the cases, which defers to its proper subordination the chronological arrangement. A flaw in the work of subdivision appears in the treatment of the surrender of right as consideration; that subsection is much overburdened. p. 393. The annotations are infrequent, although the references which are indispensable—essential statutes, alternative reports, omitted citations, and the like—are invariably to be found. The further editorial work consists in some few excerpts from treatises and maga-

zine articles and certain well advised extracts from other related cases. But following the principal cases there are no citations of cases *accord* and *contra* and there is no editorial discussion of the authority. This is to be regretted. Doubtless the editor can find sanction for these omissions; but the other policy is now more often found to characterize a case book of the highest order.

B. W.

SELECTED CASES ON THE LAW OF PROPERTY IN LAND. Edited by William A. Finch. New York: Baker, Voorhis, & Co. 1898. pp. xxiv, 1151.

To give the student some idea of the growth of the law, to make him more ready to feel its tendencies and to solve its new problems—all this is no part of Mr. Finch's purpose in the present volume. Presumably he has left it to the instruction accompanying the study. His sole aim seems to be to show what are the prevailing rules of the law of property in America to-day. His method is to make a comprehensive scheme of the law, dividing and subdividing it into a multitude of minor topics which, speaking roughly, include all that is usually given in a course on real property in one of our law schools. These sub-topics are treated as units, a group of cases—or more often a single case—shows the generally accepted rule of law in regard to each of them, constant cross-references show its relation to the rest of the subject. The cases selected are always modern, to the point, and illustrative—though not leading. The requirements of space which cut the collection down to a single volume forced the compiler always to leave out the pleadings and the statements of fact—yet these are the data of the legal problems. To the student of this volume the law of property must appear only a succession of fairly definite rules that stand ready to be applied to every need. No notes guide him to further research, his cases give him no idea of the conflict of authorities, he must rely solely on the acumen and judgment of the compiler. The book points constantly to a complete knowledge of the law rather than a thorough understanding of it.

But granting these limitations—which the compiler clearly understood—the work seems well done. The careful and exhaustive subdivision which is the most distinctive characteristic of the book is usually admirable. Leading seldom to confusion, it is often, particularly as to the law of fixtures, original and helpful. The student of the book may not gain a grip of legal principles; he will surely have a sound guide for actual litigation.

J. P. C., JR.

FORMS OF PLEADING. Prepared with especial reference to the codes of procedure of the various states and adapted to the present practice in many common law states. By Austin Abbott. Completed for publication after his decease by Carlos C. Alden. In two volumes. Vol. I. New York: Baker, Voorhis, & Co. 1898. pp. xxxiii, 803.

The old muzzle-loading precedents of the common law pleading have lost their value in the eyes of the active American practitioner. The model which is to be of service to him in constructing his own pleadings must be dominated by the "New Procedure" under which he is working. And this work of Mr. Abbott's—if one can judge by the first volume only—will give him a series of just such models. He will have a collec-

tion of forms of recognized standing or sustained by actual adjudication, so comprehensive in selection that he will find a precedent substantially "on all fours," whatever his case, whether money lost in a "bucket shop," or a through contract with a railroad over connecting lines. The formal requisites of pleading, so far as they are more than merely local, the designations of persons in their official or particular characters, and the necessary allegations of capacity to sue and be sued in the various actions form an important part of the work. The index is scant, but the general division, the details of arrangement, and the careful and complete annotation are admirable. In all, the book bids fair to become a standard work of reference.

Although it is especially adapted to the New York Code of Procedure, and the codes which imitate it, the collection is prepared also with a view to the revised practice in some of the common law states. Doubts naturally arise whether the ground is not too wide, whether it would not be better covered by a series of compilations, whether the common law precedents will not tend to confuse. These questions must be settled by the final test of the work, its service to the active practitioner for whom it was intended.

J. P. C., JR.

A TRUSTEE'S HANDBOOK. By Augustus Peabody Loring. Boston : Little, Brown, & Co. 1898. pp. xxix, 191.

This work is not the hasty compilation which handbooks often prove to be. From beginning to end it is the product of careful thought. In handling his subject the author discusses no theory, but aims at stating in brief, positive sentences the established rules of the law. Where jurisdictions differ the fact is noted and generally the different views are set forth. The scope of the book, however, forbids comparing the merits of the respective theories.

The plan of the book embraces the treatment of the law regarding the appointment of the trustee, the powers he may exercise, and the burdens he bears. The manner in which he should care for and invest the trust property is dealt with, and the circumstances under which he may be removed. The work also includes the rights of the beneficiary, both as against the trustee and as against strangers. Finally, there is a short chapter on the "interstate law;" such questions as arise where the trustee is non-resident or where the property is out of the jurisdiction. References are given for nearly every proposition,—a fact which makes the book valuable to the practitioner.

The author is accurate in his statement of the law; and, while in many situations the only safe course for a trustee is to consult a responsible lawyer, yet as regards the general duties of his position he may safely rely on this book.

G. B. H.

BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. By James Bradley Thayer. Boston: Little, Brown, & Co. 1898.

BUILDING AND LOAN ASSOCIATIONS. By Wm. W. Thornton and Frank H. Blackledge. Albany, N. Y.: Matthew Bender, 1898.

GENERAL DIGEST. Quarterly advance sheets. Rochester, N. Y.: Lawyers' Co-operative Publishing Co. Oct. 1898.

MANSLAUGHTER, CHRISTIAN SCIENCE, AND THE LAW. By William H. Pur-

rington. New York: The Publishers' Printing Co. 1898.

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THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. By William D. Guthrie. Boston: Little, Brown, & Co., 1898.

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THE STATUS OF OUR NEW TERRITORIES.¹

WHAT extent of territory do the United States of America comprise? In order to answer this question intelligently, it is necessary to ascertain the meaning of the term "United States."

First. — It is the collective name of the States which are united together by and under the Constitution of the United States; and, prior to the adoption of that Constitution, and subsequently to the Declaration of Independence, it was the collective name of the thirteen States which made that Declaration, and which, from the time of the adoption of the Articles of Confederation to that of the adoption of the Constitution, were united together by and under the former. This, moreover, is the original, natural, and literal meaning of the term. Between the time of the first meeting of the Continental Congress, and that of the Declaration of Independence, the term "United Colonies" came into general use,² and, upon in-

¹ The following article was already planned, and in part written, when the writer first learned of Mr. Randolph's intention to furnish an article on the same general subject for the January number of this Review. While, therefore, the writer desires to acknowledge the material assistance which he has derived from Mr. Randolph's article, he entirely disclaims any intention to answer it, or to criticise it.

² It first occurs in the Journal of the Continental Congress, under date of June 7, 1775, vol. I. (ed. of 1777), p. 114 ["Resolved, that Thursday, the 20th of July next, be observed throughout the twelve United Colonies, as a day of humiliation, fasting, and prayer"]; and, from that time to the date of the Declaration of Independence, its use is very frequent. It occurs three times in the commission issued to Washington as commander-in-chief (p. 122), six times in the articles of war (pp. 133, 137, 138, 139, 140), and twice in the Declaration of the United Colonies of North America, under date of July 6, 1775, setting forth the causes and necessity of their taking up arms

dependence being declared, as the thirteen colonies became the thirteen States, the term was of course changed to "United States." In the Declaration of Independence both terms are used.¹ When the Articles of Confederation were framed, "United States of America" was declared to be the name and style of the confederation created by those articles.² This, however, had no other effect than to confirm the existing practice, and to increase the use of the term in the sense which it had already acquired; and accordingly, during the whole period of the Confederation, "United States" meant the same as "the thirteen United States," and the primary reason for using either term was to save the necessity of enumerating the thirteen States by name.

Indeed, the Articles of Confederation were merely an agreement between the thirteen States in their corporate capacity, or, more correctly, an agreement by each of the thirteen States with all the others. There were, therefore, thirteen parties to the confederation, and no more, and the people of the different States as individuals had directly no relations with it. Accordingly, it was the States in their corporate capacity that voted in the Continental Congress, and not the individual members of the Congress; and hence the voting power of a State did not at all depend upon the number of its delegates in Congress, and in fact each State was left to determine for itself, within certain limits, how many delegates it would send.³ Hence also each State had the same voting power.⁴ Even the style of the Continental Congress was "The United States in

(pp. 143, 145). Sometimes the number of United Colonies was specified, and sometimes it was not. The colony of Georgia did not unite with the other twelve, and so was not represented by delegates in Congress, until the thirteenth of September, 1775 (p. 197). Prior to that date, therefore, the term used was either the United Colonies, or the twelve United Colonies, while after that date it was either the United Colonies, or the thirteen United Colonies.

While this term was making its way to the front, it had a competitor (which was even earlier in the field), in the term "Continent" or "Continental," which was also much used during the war of the Revolution. Perhaps an attentive study of the Journal of Congress would show that "Continent" or "Continental" was not precisely synonymous with United Colonies or United States, but it certainly was very nearly so.

¹ "United Colonies" is used once, namely, in the concluding paragraph, and "United States" is used twice, namely, in the title and in the concluding paragraph.

² Art. 1.

³ By the fifth article of Confederation, no State was to be represented by less than two delegates, nor by more than seven.

⁴ Namely, each State had one vote. (Fifth Article of Confederation.)

Congress assembled," — not (as the present style would suggest) "The Delegates of the United States in Congress assembled"; and if the style had been "The Thirteen United States in Congress assembled," the meaning would have been precisely the same.

Evidence to the same effect, as to the sense in which the term "United States" was used prior to the time of the adoption of the Constitution, is furnished by the treaties made during the period of the Confederation. Thus, the Treaty of Alliance made with France, February 6, 1778, begins:¹ "The Most Christian King and the United States of North America, namely, New Hampshire," etc. (enumerating the thirteen States). So the Treaty of Amity and Commerce, made with France the same day, begins:² "The Most Christian King and the thirteen United States of North America, New Hampshire," etc. So the Treaty of Amity and Commerce made with Holland, October 8, 1782, begins:³ "Their High Mightinesses, the States-General of the United Netherlands, and the United States of America, namely, New Hampshire," etc. So the Treaty of Amity and Commerce made with Sweden, April 3, 1783, begins:⁴ "The King of Sweden and the thirteen United States of North America, namely, New Hampshire," etc. Lastly, the Definitive Treaty of Peace with England, September 3, 1783, by which our independence was established, after a recital, proceeds thus:⁵ "Art. 1. His Britannic Majesty acknowledges the said United States, namely, New Hampshire, &c., to be free, sovereign, and independent States; that he treats with them as such; and relinquishes all claims to the government, propriety, and territorial rights."

With the adoption of the Constitution there came a great change; for the Constitution was not an agreement, but a law, — a law, too, superior to all other laws, coming as it did from the ultimate source of all laws, namely, the people, and being expressly declared by them to be the supreme law of the land.⁶ At the same time, however, it neither destroyed nor consolidated the States, nor even affected their integrity; and, though it was established by the people of the United States; yet it was not established by them as one people, nor was its establishment a single act; but, on the contrary, its establishment in each State was the act of

¹ 8 U. S. Stats. 6.

² Page 32.

³ Page 80.

⁴ Page 12.

⁵ Page 60.

⁶ Art. 6, sect. 2.

the people of that State; and if the people of any State had finally refused to ratify and adopt it, the consequence would have been that that State would have ceased to be one of the United States. Indeed, the Constitution and the Articles of Confederation differ from each other, in respect to the source of their authority, in one particular only, namely, that, while the former proceeded from the people of each State, the latter proceeded from the Legislature of each State. In respect to their effect and operation also, the two instruments differ from each other in one particular only, namely, that, while the Articles of Confederation merely imposed an obligation upon each State, in its corporate and sovereign capacity, in favor of the twelve other States, the Constitution binds as a law, not each *State*, but all persons and property in each State. These differences, moreover, fundamental and important as they undoubtedly are, do not, nor does either of them, at all affect either the meaning or the use of the term "United States"; and, therefore, the conclusion is that the meaning which that term had the day after Independence was declared, it still retains, and that this is its natural and literal meaning.

Regarded, then, as simply the collective name of all the States, do the United States comprise territory? Directly, they certainly do not; indirectly, they do comprise the territory of the forty-five States, and no more. That they comprise this territory only indirectly, appears from the fact that such territory will always be identical with the territory of all the States in the aggregate, — will increase as that increases, and diminish as that diminishes.

Secondly. — Since the adoption of the Constitution, the term "United States" has been the name of a sovereign, and that sovereign occupies a position analogous to that of the personal sovereigns of most European countries. Indeed, the analogy between them is closer, at least in one respect, than at first sight appears; for a natural person who is also a sovereign has two personalities, one natural, the other artificial and legal, and it is the latter that is sovereign. It is as true, therefore, of England (for example) as it is of this country, that her sovereign is an artificial and legal person (*i. e.*, a body politic and corporate), and, therefore, never dies. The difference between the two sovereigns is, that, while the former consists of a single person, the latter consists of many persons, each of whom is a member of the body politic. In short, while the former is a corporation sole, the latter is a corporation aggregate.

Who, then, are those persons of whom the United States as a body politic consists, and who constitute its members? Clearly they must be either the States in their corporate capacity, *i. e.*, artificial and legal persons, or the citizens of all the States in the aggregate; and it is not difficult to see that they are the former. Indeed, the latter do not form a political unit for any purpose. The citizens of each State form the body politic of that State, and the States form the body politic of the United States. The latter, therefore, consisted at first of the original thirteen States, just as the Confederation did; but, as often as a new State was admitted, a new member was received into the body politic, — which, therefore, now consists of forty-five members. It will be seen, therefore, that, while the United States, in its second sense, signifies the body politic created by the Constitution, in its first sense it signifies the members of that body politic in the aggregate. A consequence is that, while in its first sense the term "United States" is always plural, in its second sense it is in strictness always singular.

The State of New York furnishes a good illustration of the two senses in which the term "United States" is used under the Constitution; for the style of that State, as a body politic, is "The People of the State of New York," and the members of that body politic are the citizens of the State. The term "people," therefore, in that State, means, first, all the citizens of the State in the aggregate (*i. e.*, the members of the body politic), and, secondly, the body politic itself; and while in the former sense it is plural, in the latter sense it is singular.

The term "United States" is used in its second sense whenever it is used for the purpose of expressing legal or political relations between the United States and the particular States, or between the former and foreign sovereigns or states, or legal relations between the former and private persons, while it is used in its first and original sense whenever it is desired to designate the particular States collectively, either as such or as members of the body politic of the United States. It is also used in that sense whenever it is used to designate the territory of all the States in the aggregate.

As a substitute for the term "United States," when used in its second sense, the term "Union" is often employed. The original difference between "United States" and "Union" was that, while the former was concrete, the latter was abstract; and hence it is

that the latter cannot be substituted for the former when used in its original sense.¹

When used in its second sense, it is plain that the term "United States" has no reference to extent of territory, either directly or indirectly. Regarded as a body politic, the United States may and does own territory, and may be and is a sovereign over territory, but to speak of its constituting or comprising territory would be no less absurd than to predicate the same thing of a personal sovereign, though the absurdity would be less obvious.

Thirdly. — Since the treaty with England of September 3, 1783, the term "United States" has often been used to designate all territory over which the sovereignty of the United States extended. The occasion for so using the term could not of course arise until the United States acquired the sovereignty over territory outside the limits of any State, and they first acquired such territory by the treaty just referred to. For, although, as has been said, that treaty was made with each of the thirteen States, yet, in fixing the boundaries, the thirteen States were treated as constituting one country, England not being interested in the question how that country should be divided among the several States. Moreover, the boundaries established by the treaty embraced a considerable amount of territory in the Northwest to which no State had any separate claim, and which, therefore, belonged to the United States; and the territory thus acquired was enlarged from time to time by cessions from different States, until at length it embraced the entire region within the limits of the treaty, and west of Pennsylvania, Virginia, North Carolina, and Georgia, as the western boundaries of those States were afterwards established, with the exception of the territory now constituting the State of Kentucky. Then followed in succession the acquisitions from France, Spain, Texas, and Mexico. Out of all the territory thus acquired, twenty-eight great States have been from time to time carved; and yet there has never been a time, since the date of the treaty before referred to, when the United States had not a considerable amount of territory outside the limits of any State.

¹ The term "Union" is used three times in the Constitution, namely, in Art. 1, sect. 8, subsect. 15 [Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions"]; in Art. 2, sect. 3 [the President "shall from time to time give to the Congress information of the state of the Union," &c.]; and in Art. 4, sect. 3, subsect. 1 ["new States may be admitted by the Congress into this Union"].

It is plain, therefore, that for one hundred and fifteen years there has been more or less need of some word or term by which to designate as well the Territories of the United States as the States themselves; and such word or term ought, moreover, to have been one signifying directly not territory, but sovereignty, sovereignty being the only thing that can be predicated alike of States and Territories. The same need was long since felt by England as well as by other European countries, and the word "empire" was adopted to satisfy it; and perhaps we should have adopted the same word, if we had felt the need of a new word or term more strongly. Two peculiarities have, however, hitherto characterized the territory held by the United States outside the limits of any State: first, such territory has been virtually a wilderness; secondly, it has been looked upon merely as material out of which new States were to be carved just as soon as there was sufficient population to warrant the taking of such a step; and hence the need of a single term which would embrace territories as well as States has not been greatly felt. At all events, no such new term has been adopted; and hence "United States" is the only term we have had to designate collectively either the States alone, or the States and Territories; and accordingly, while it has always been used for the former of these two purposes, it has also frequently been used for the latter.

It is very important, however, to understand that the use of the term "United States" to designate all territory over which the United States is sovereign, is, like the similar use of the word "empire" in England and other European countries, purely conventional; and that it has, therefore, no legal or constitutional significance. Indeed, this use of the term has no connection whatever with the Constitution of the United States, and the occasion for it would have been precisely the same if the Articles of Confederation had remained in force to the present day, assuming that, in other respects, our history had been what it has been.

The conclusion, therefore, is that, while the term "United States" has three meanings, only the first and second of these are known to the Constitution; and that is equivalent to saying that the Constitution of the United States as such does not extend beyond the limits of the States which are united by and under it, — a proposition the truth of which will, it is believed, be placed beyond doubt by an examination of the instances in which the term "United States" is used in the Constitution.

Its use first occurs in the preamble,¹ in which it is used twice. The first time it is plainly used in its original sense, *i. e.*, as the collective name of the States which should adopt it. If the words had been "We, the people of the thirteen² United States respectively," the sense in which "United States" was used would have been precisely the same. Nor is there any doubt that it is used in the same sense at the end of the preamble. Of course there is a very strong presumption that when a constitution is made by a sovereign people, it is made exclusively for the country inhabited by that people, and exclusively for that people regarded as a body politic, and so having perpetual succession; and the same thing is true, *mutatis mutandis*, of a constitution made by the people of several sovereign States united together for that purpose. The preamble, however, does not leave it to presumption to determine for what regions of country and what people the Constitution of the United States was made; for it expressly declares that its purposes and objects are, first, to form a more perfect union (*i. e.*, among the thirteen States, or as many of them as shall adopt it). Then follow four other objects which, though in terms indefinite as to their territorial scope, are by clear implication limited to the same States;³ and lastly its purpose and object are

¹ "We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

² To have stated the number of States in the preamble would, however, have been inconvenient, because it was uncertain, when the Constitution was framed, how many States would adopt it. It was provided by Art. 7 that, as soon as it was adopted by nine States, it should become binding upon the States adopting it, nine being within a fraction of three-fourths of the whole, and the assent of nine States having been required by the Articles of Confederation for the doing of all acts of prime importance. (See Art. 9, last paragraph but one, and Arts. 10 and 11.) In fact, only eleven States participated in the first election of Washington as President, and only that number was represented in Congress during the first session of the first Congress.

³ Moreover, the usage of the times furnishes positive proof that the terms "common defence" and "general welfare" were used in the preamble with exclusive reference to the thirteen States; for the words "common" and "general" were familiarly used to distinguish what concerned the United States from what concerned the several States as such, and that too at a time when "United States" could not possibly mean anything else than the thirteen United States. Thus, the 3d Article of Confederation provides as follows: "The said States hereby severally enter into a firm league of friendship with each other, for their 'common' defence, the security of their liberties, and their mutual and 'general' welfare." So also the 5th Article contains the following: "For the more convenient management of the 'general' interest of the United States, delegates shall be annually appointed . . . to meet in Congress." So also in

declared to be to secure the blessings of liberty to the people by whom it is ordained and established, and their successors; for, though the word used is "posterity," it is clearly not used with literal accuracy, but in the sense of "successors." According to the preamble, therefore, the Constitution is limited to the thirteen States which were united under the Articles of Confederation; and it is by virtue of Art. 4, sect. 3, subsect. 1,¹ and in spite of the preamble, that new States have been admitted upon an equal footing with the original thirteen.

In the phrases, "Congress of the United States,"² "Senate of the United States,"³ "President of the United States," or "Vice President of the United States,"⁴ "office under the United States,"⁵ "officers of the United States,"⁶ "on the credit of the United States,"⁷ "securities and current coins of the United States,"⁸ "service of the United States,"⁹ "government of the United States,"¹⁰ "granted by the United States,"¹¹ "Treasury of the United States,"¹² "Constitution of the United States,"¹³ "army and navy of the United States,"¹⁴ "offences against the United States,"¹⁵ "judicial power of the United States,"¹⁶ "laws of the United States,"¹⁷ "controversies to which the United States shall be a party,"¹⁸ "treason against the United States,"¹⁹ "territory or other property belonging to the

the 7th Article are the words: "When land forces are raised by any State for the 'common' defence," etc. So in the 8th Article are the words: "All charges of war, and all other expenses that shall be incurred for the 'common' defence or 'general' welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a 'common' treasury." Lastly, the 9th Article contains the following: "The United States in Congress assembled shall have authority to appoint such other committees and civil officers as may be necessary for managing the 'general' affairs of the United States under their direction."

¹ See *supra*, page 370, note 1.

² Art. 1, sect. 1; Art. 1, sect. 2, subsect. 3.

³ Art. 1, sect. 3, subsect. 1.

⁴ Art. 1, sect. 3, subsects. 4, 5, and 6; Art. 2, sect. 1, subsects. 1 and 8; 12th Amendment; 14th Amendment, sect. 2; Art. 1, sect. 7, subsects. 2 and 3.

⁵ Art. 1, sect. 3, subsect. 7; Art. 1, sect. 9, subsect. 8; Art. 2, sect. 1, subsect. 2; Art. 6, subsect. 3; 14th Amendment, sect. 3; Art. 1, sect. 6, subsect. 2.

⁶ Art. 2, sect. 2, subsect. 2, sect. 3, sect. 4; Art. 6, subsect. 3; 14th Amendment, sect. 3.

⁷ Art. 1, sect. 8, subsect. 2.

⁸ Art. 1, sect. 8, subsect. 6.

⁹ Art. 1, sect. 8, subsect. 16; Art. 2, sect. 2, subsect. 1.

¹⁰ Art. 1, sect. 8, subsects. 17 and 18; Art. 2, sect. 1, subsect. 3; 12th Amendment

¹¹ Art. 1, sect. 9, subsect. 8.

¹² Art. 1, sect. 10, subsect. 2; Art. 1, sect. 6, subsect. 1.

¹³ Art. 2, sect. 1, subsect. 8; 14th Amendment, sect. 3.

¹⁴ Art. 2, sect. 2, subsect. 1.

¹⁵ Art. 2, sect. 2, subsect. 1.

¹⁶ Art. 3, sect. 1; 11th Amendment.

¹⁷ Art. 3, sect. 2, subsect. 1; Art. 6, subsect. 2.

¹⁸ Art. 3, sect. 2, subsect. 1.

¹⁹ Art. 3, sect. 3, subsect. 1.

United States,"¹ "claims of the United States,"² "the United States shall guarantee,"³ "shall be valid against the United States,"⁴ "under the authority of the United States,"⁵ "court of the United States,"⁶ "delegated to the United States,"⁷ "public debt of the United States,"⁸ "insurrection or rebellion against the United States,"⁹ "shall not be denied or abridged by the United States,"¹⁰ "neither the United States nor any State shall assume or pay,"¹¹ the term "United States" is used in its second sense.¹² It seems also to be used in the same sense in the phrase, "citizen of the United States,"¹³ for it is only as a unit, a body politic, and a sovereign, that the United States can have citizens, — not as the collective name of forty-five States. In the phrase, "common

¹ Art. 4, sect. 3, subject. 2.

² Art. 3, sect. 4.

³ Art. 6, subject. 2.

⁷ 10th Amendment.

⁹ 14th Amendment, sect. 4.

¹¹ 14th Amendment, sect. 4.

² Art. 4, sect. 3, subject. 2.

⁴ Art. 6, subject. 1.

⁶ 7th Amendment.

⁸ 14th Amendment, sect. 4.

¹⁰ 15th Amendment.

¹² As the second sense in which the term "United States" is used in the Constitution had no existence prior to the time of the adoption of the Constitution, it follows that, whenever the Articles of Confederation use the term in such phrases as any of those enumerated above or in similar phrases, they use it (as they do in all cases) in its original sense. Instances will be found in Art. 4 ["no imposition, duties, or restriction shall be laid by any State on the property of the United States or either of them"], Art. 5 ["nor shall any delegate hold any office under the United States," etc.], Art. 6 ["nor shall any person holding any office of profit or trust under the United States or any of them accept of any present," etc.], Art. 9 ["no State shall be deprived of territory for the benefit of the United States;" "nor ascertain the sums and expenditures necessary for the defence and welfare of the United States or any of them;" "in the service of the United States;" "Congress of the United States;" "on the credit of the United States;" "at the expense of the United States"], Art. 11 ["Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of, this Union"], Art. 12 ["shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged"], and Art. 13 ["Congress of the United States"].

In most cases, however, in which the term "United States," in its second sense, or the term "Congress" or "Congress of the United States," would be used in the Constitution, the phrase "United States in Congress assembled" is used in the Articles of Confederation. That phrase occurs in those articles a great number of times, and, whenever it occurs, "United States" is used in its original sense. This is clearly brought out by the following words in Art. 5: "Each State shall maintain its own delegates in any meeting of the States;" also by the following words in Art. 10: "the voice of nine States in the Congress of the United States assembled;" and also by the following words in Art. 12: "before the assembling of the United States [not the delegates of the United States] in pursuance of the present confederation."

¹³ Art. 1, sect. 2, subject. 2; Art. 1, sect. 3, subject. 3; Art. 2, sect. 1, subject. 5; 14th Amendment, sects. 1 and 2; 15th Amendment, sect. 1.

defence and general welfare of the United States,"¹ it seems to be used in its first or original sense, especially as "common defence" and "general welfare" are taken from the preamble.² Certainly there is no pretence for saying it is used in its third sense. In the phrase, "throughout the United States,"³ there is believed to be no doubt that it is used in its original sense,⁴ though it may be claimed that it is used in its third sense.⁵ That it is used in its original sense in one instance is certain;⁶ and when the same phrase is used in different parts of the Constitution, a strong presumption arises that it is always used in the same sense.

In the phrase, "resident within the United States,"⁷ there can be no doubt that "United States" is used in its original sense, the meaning being the same as if the words had been, "resident in one or more of the United States."

The phrase, "one of the United States," affords a good instance of the use of "United States" in its original sense.⁸

In the phrase, "shall not receive any other emolument from the United States or any of them,"⁹ it is certain that "United States" is used in its second sense, though it is also certain that the draughtsman supposed he was using it in its original sense.¹⁰

¹ Art. 1, sect. 8, subsection. 1.

² See *supra*, page 372, and notes 1 and 3.

³ Art. 1, sect. 8, subsections. 1 and 4; Art. 2, sect. 1, subsection. 3.

⁴ It has been seen (*supra*, p. 365, n. 2) that the first time the term "United Colonies" occurs in the Journal of Congress, it is in the phrase, "throughout the twelve United Colonies." The phrase, "throughout the United States" is also used in two instances in the 9th Article of Confederation ["the United States in Congress assembled shall have the sole and exclusive right and power of fixing the standard of weights and measures throughout the United States . . . establishing or regulating Post Offices *from one State to another* throughout all the United States"], in neither of which can it possibly have any other meaning than throughout the thirteen United States. Can any reason then be given for supposing that the authors of the Constitution attached a wholly different meaning to the same phrase, namely, "throughout all the territory within the sovereignty of the United States"? It is believed that there cannot; and yet the question depends entirely upon intention. For the reader should bear in mind the fact that, while the term "United States" may have its second meaning in the Constitution, though it was previously used in the same phrase with its original meaning (and that, too, without any change of intention), it cannot, in the Constitution or elsewhere, have its third meaning, in a phrase in which it had previously had its first meaning, without a corresponding change of intention.

⁵ See *infra*, page 381.

⁶ Art. 2, sect. 1, subsection. 4 ["The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States"].

⁷ Art. 2, sect. 1, subsection. 5.

⁸ Art. 2, sect. 1, subsection. 7.

⁹ 11th Amendment.

¹⁰ At page 374, note 12, will be found an extract from the 4th Article of Confedera-

In the phrase, "all persons born or naturalized in the United States,"¹ it seems clear that "United States" is used in its original sense; for, first, it is either used in that sense or in its third sense, and, as the latter is not a constitutional or legal sense, there is a presumption that the term is not used in that sense in an amendment of the Constitution; secondly, it is declared that the same persons shall be citizens of the State in which they reside, and this shows that the authors of the amendment contemplated only States, for, if they had contemplated Territories as well, they certainly would have said "citizens of the State or Territory in which they reside"; thirdly, the whole of the 14th Amendment had reference exclusively to the then late war, and was designed to secure its results,—in particular to secure to persons of African descent certain political rights, and to take from the States respectively in which they might reside the power to deprive them of those rights. Moreover, the amendment consists mainly of prohibitions, and these are all (with a single exception which need not be mentioned) aimed exclusively against the States. It was no part of the object of the amendment to restrain the power of Congress (which its authors did not distrust), and hence there was no practical reason for extending its operation to Territories, in which all the power resided in Congress. What is the true meaning of "United States" in the phrase under consideration is certainly a question of great moment, for on its answer depends the question whether all persons hereafter born in any of our recently acquired islands will be by birth citizens of the United States.

The foregoing comprise all the instances but one in which the term "United States" is used either in the original Constitution,

tion, in which occurs the phrase, "the United States or either of them," and also an extract from the 6th Article, in which occurs the phrase, "the United States or any of them;" and, while these phrases are perfectly correct where they stand, yet a transfer to the Constitution of the passages containing them would have made the same phrases incorrect, as such transfer would have changed the meaning of "United States." On the other hand, a transfer to the Constitution of an extract in the same note from Art. 9, containing the same phrase, would, it seems, have caused no change in the meaning of "United States," and hence the phrase in question would have been correct, notwithstanding such transfer.

¹ 14th Amendment, sect. 1: ["All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."]

or in any of its amendments. The other instance is found in the 13th Amendment,¹ — in which "United States" is plainly used in its original sense, if the words which follow it are to have any meaning; and yet, if the authors of that amendment had understood that the term "United States," when used in the Constitution to express extent of territory, had its third meaning, they would have omitted the words, "or any place subject to their jurisdiction."

If a broader view be taken of the Constitution and its amendments, it will be found that the only portions of it which indicate the slightest intention to extend their operation beyond the limits of the States, are the clause authorizing the admission of new States,² the clause providing for the government of territories,³ and the 13th Amendment.

The Constitution of the United States, like other constitutions, is mainly occupied with the creation and organization of the three great departments of government, — the legislative, the executive, and the judicial. Accordingly, the first three articles, comprising about six-sevenths of the whole, are entirely occupied with these three departments respectively. The last three sections of Art. 1 (namely, the 8th, 9th, and 10th Sections) are, however, peculiar to the Constitution of the United States as a federal constitution, and will, therefore, be excluded from view for the present. Of the remainder of Art. 1, and of the whole of Arts. 2 and 3, it may be affirmed that not one word in either has any reference or any application to any territory outside the limits of the States. As to Arts. 1 and 2, the correctness of this view has never been questioned, and, as to Art. 3, its correctness is established by the uniform practice of the legislative department⁴ of the govern-

¹ ["Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."]

² See *supra*, page 370, note 1.

³ Art. 4, sect. 3, subsect. 2.

⁴ For example, the entire judicial power in the Territories has always been vested by Congress in one set of courts, regardless of the dual system which exists in all the States by virtue of Art. 3 of the Constitution. Moreover, these courts have always been termed Territorial courts (not United States courts), and have always been so regarded; the statutes by which they have been created and governed are wholly separate and distinct from those creating and governing the courts of the United States within the States; their judges have generally held office only for a term of four years, whereas all judges appointed under Art. 3 of the Constitution hold office during good behavior; and originally there was no appeal from any Territorial court to the Supreme Court.

ment, and by a uniform course of decisions in the judicial department.¹

A distinction must, however, be made between those articles of the Constitution by which the several departments of the government were respectively created and organized, and those departments themselves; for the reasoning which is applicable to the former is not necessarily applicable to the latter, nor is the same reasoning necessarily applicable to all of the latter. It does not follow, because a department of the government is created and organized by the Constitution with reference solely to a given territory, that, therefore, the power of that department and its sphere of action are limited to that territory. It may or may not be true, and it may be true of one department, and not true of another department. In fact, it is true of the judicial department, but it is not true of either the legislative or the executive department. How is it, then, that one of these three departments can differ so materially from the other two, when no such difference is indicated by the Constitution, which created and organized them all? It is because the difference depends, not upon the Constitution, but upon the nature of the departments themselves. The legislative and executive departments are sovereign in their nature, and, therefore, their power and sphere of action are co-extensive with the sovereignty of the United States, of which sovereignty they constitute the vital part,—of which, in fact, they constitute all that has been delegated. It is by them alone that the sovereignty of the United States can, without changing or overthrowing the present Constitution, either speak or act, *i. e.*, either declare its will, or execute that will when declared. The judicial department, on the other hand, is not the depositary of any portion of the sovereign power; its function is simply to judge; it cannot even enforce its own judgments; without the support of both the legislative and executive departments it could have no existence, other than theoretical, since the latter alone can appoint judges, and the former alone can provide them with salaries. It is true that the judicial department sometimes disregards what the legislative department has declared to be the sovereign will; but that is not because of the nature of the judicial office,—it is rather in spite

¹ *Seré v. Pitot*, 6 Cr. 332; *Am. Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235; *Clinton v. Englebrecht*, 13 Wall. 434; *Reynolds v. U. S.*, 98 U. S. 145; *The City of Panama*, 101 U. S. 453; *McAllister v. U. S.*, 141 U. S. 174.

of it; it is not because it is the function of the judicial department to sit in judgment upon the action of the legislative department, but because the judicial department has held that it cannot do otherwise than disregard an act of the legislative department which is in violation of the Constitution, without itself incurring the guilt of violating the Constitution, and also (it may be added) because the legislative department and the people have acquiesced in that view.

While, therefore, the power of the legislative and executive departments is co-extensive with the sovereignty, the judicial department can exercise only such jurisdiction as has been delegated to it; and hence its jurisdiction would still be limited to the original thirteen States, had not the Constitution provided for the admission of new States.

There is, therefore, no room for any question as to where either the legislative, the executive, or the judicial power in our new territories resides; for the legislative power clearly resides in the Congress of the United States, and the executive power in the President of the United States; and the power of establishing the judicial department also resides in Congress, though Congress cannot itself exercise the power belonging to that department. In the legislative and executive departments, therefore, is vested all the sovereign power in our new territories that has been delegated by the people; and the real question is in what character, and subject to what limitations, if any, do they hold this power. Does Congress (for example) hold the legislative power there as it does in the States, *i. e.*, subject to all the limitations and restrictions imposed by the Constitution; or does it hold that power in the new territories without any other limitation than that imposed by the 13th Amendment, namely, that it shall not establish slavery in any of them; or does the truth lie somewhere between these two extremes? And this brings us to the question whether the limitations and restrictions imposed upon Congress by the Constitution are operative outside the States. These limitations and restrictions are found chiefly in the 8th and 9th sections of Art. 1, and in the first ten Amendments.

The 8th Section of Art. 1 owes its existence entirely to the fact that the Constitution of the United States, while it is a true constitution, and creates a true sovereign, is yet a federal constitution. By it the people of each State vested a portion of the sovereignty

of that State in the new sovereign created by the Constitution, *i. e.*, they made a partition of the sovereignty of the State between the State and the United States, and the 8th section of Art. 1 contains that partition. The mode of making it was by granting to the new sovereign those branches of sovereignty which are enumerated in the respective subsections of Section 8. That section, therefore, so far as regards its main object and scope, can have no application to any territory beyond the limits of the several States, for no partition was to be made of the sovereignty over any such territory. A strong presumption, therefore, arises that no part of the section was intended to extend beyond the limits of the States, as it cannot be supposed that any incidental objects were intended to have a more extensive operation than the main object.

What were the incidental objects of the section? One was to provide security that the United States, in exercising those branches of sovereignty which had been granted to it, should treat all the States alike; for, if no such security were provided, a majority of States might at any time combine to oppress a minority. Accordingly, subsection 1 having granted to Congress the power "to lay and collect taxes, duties, imposts, and excises," it is added "but all duties, imposts, and excises shall be uniform throughout the United States." So, also, subsection 4 grants to Congress the power to establish an "uniform" rule of naturalization, and "uniform" laws on the subject of bankruptcies "throughout the United States." Reasons have already been given for believing that the term "United States," in both these subsections, is used in its original sense; and we now find another argument, in favor of the same view, in the scope and object of Section 8. As it would be absurd to hold that the grant of power in these subsections had any reference to territories as distinguished from States, since Congress has full legislative powers in the territories without any grant from the States, so it would be absurd to hold that the limitation of the power has a more extensive operation than the power itself. Moreover, if all other arguments fail, it is at least true that those subsections contain nothing whatever to overthrow the presumption in favor of their being limited in their operation to the States.

There is a *dictum* by Chief Justice Marshall, in *Loughborough v. Blake*,¹ which is opposed to the view insisted upon in this article.

¹ 5 Wheat. 317.

It is, however, only a *dictum*, as the learned Chief Justice himself admits. The circumstances of the case were these. Jan. 9, 1815, Congress passed an Act¹ laying an annual direct tax of \$6,000,000 upon the United States, which sum it proceeded to apportion among the eighteen then existing States. Feb. 27, 1815, Congress passed another Act,² which in effect extended the first Act to the District of Columbia. The plaintiff having refused to pay his share of the tax imposed upon the District by the second Act, claiming that the Act was unconstitutional, his property was seized, and he brought trespass against the officer making the seizure. The plaintiff's claim admitted of a very short answer, namely, that by Art. 1 of the Constitution, Section 8, subsection 17, Congress had all the power within the District that it had in any State *plus* the power of the legislature of that State, and, therefore, had an unqualified power of taxation. Still, the Chief Justice thought it desirable (for what reason is not very apparent) to show that Congress also had the power to impose the tax under the same grants of power by which it was authorized to pass the first Act. Accordingly, he said, first, the power given to Congress to lay and collect taxes was in terms without limitation as to place; secondly, the power to lay and collect taxes had the same extent as to place as the power to lay and collect duties, imposts, and excises; thirdly, the latter power was required to be exercised uniformly throughout the United States, and it could not be so exercised unless it extended throughout the United States; and this brought him to the question, what was meant by "United States" in the phrase, "throughout the United States." "Does this term," said he,³ "designate the whole or any particular portion of the American Empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania." If this *dictum* be taken as simply giving one of the meanings of the term "United States," and without reference to the Constitution, its correctness cannot be questioned; but it seems not to have occurred to its learned author that, while the meaning which he attributed to the term was one of its meanings, it had other meanings also;

¹ C. 21, 3 Stats. 164.

² C. 60, 3 Stats. 216.

³ 5 Wheat. 319.

that it had been used in another sense in the first¹ of the two Acts of Congress which gave rise to the litigation in question, and that his argument, therefore, required him to show that the meaning which he attributed to the term, rather than one of the others, was its true meaning in the clause of the Constitution upon which he was commenting.

Perhaps it will not be thought unreasonable to place against the *dictum* in question the *dictum* of Webster in another case,² also decided by Chief Justice Marshall. It is true that he was arguing for a client; but then it was not his habit, even as counsel, to state propositions of law which he did not believe to be true, and the truth of which he was not prepared to maintain. He said:³ "What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The Territory and all within it are to be governed by the acquiring power, except where there are reservations by the treaty. . . . Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything, — she might have refused a trial by jury, and refused a legislature. . . . Does the law establishing the court at Key West come within the restrictions of the Constitution of the United States? If the Constitution does not extend over this territory, the law cannot be inconsistent with the national Constitution." It may be added that the decision was in Webster's favor, that not a word was said by the Chief Justice in disapproval of the passage just quoted, that *Loughborough v. Blake* was not cited either by counsel or judge, that it has seldom been cited by any member of the court by which it was decided, and that the *dictum* under consideration has, it is believed, never been so cited.

One other observation may be made upon *Loughborough v. Blake*, namely, that the District of Columbia differs materially from a Territory, that the former is within the limits of a State, was once a part of a State, and, therefore, the Constitution once

¹ Which enacts (sect. 1) "that a direct tax of \$6,000,000 be and is hereby annually laid upon the United States, and the same shall be and is hereby apportioned to the States respectively in manner following: To the State of New Hampshire \$193,586.74," etc. (enumerating the eighteen then existing States). Plainly, therefore, "United States" is here used in its original sense.

² *Am. Ins. Co. v. Canter*, 1 Pet. 511.

³ 1 Pet. 538.

extended over it; and it may not be easy to show that it has ever ceased to extend over it.

The object of the 9th Section of Art. 1 is to prohibit Congress from doing certain things which it would otherwise have had the power to do under the several grants in the 8th section. Its object was, therefore, the same as that of the limitations contained in Section 8, and hence it would be as irrational to give Section 9 a more extensive operation, in respect to territory, than Section 8 has as it would be to give to the limitations upon the power of Congress imposed by Section 8 upon the grants contained in that section a more extensive operation than the grants themselves have.

An examination of the different subsections of Section 9 (other than subsection 1, which, having ceased to be operative, may be passed over) will lead to the same conclusion. Thus, subsection 2 provides that the writ of *Habeas Corpus* shall not be suspended, except under special circumstances; subsection 3, that no bill of attainder or *ex post facto* law shall be passed; subsection 4, that all "capitation or other direct" taxes which shall be laid shall be apportioned among the States according to the respective numbers of their inhabitants, *i. e.*, shall neither be laid upon property without reference to State lines, nor apportioned among the States according to their property;¹ subsection 5, that no tax or duty shall be laid on articles exported *from any State*; subsection 6, that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, and that no vessel bound to or from one State shall be obliged to enter, clear, or pay duties in another; subsection 7, that no money shall be drawn from the Treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time; and subsection 8, that no title of nobility shall be granted by the United States, and that no person holding any office of trust or profit under them shall accept of any present, emolument, office, or title from any King, Prince, or foreign State.

Of these seven subsections, no one discloses any intention to make it operative over a greater extent of territory than any of the others, and it must, therefore, be assumed that the intention was,

¹ By Article 8 of the Confederation, the amount of money required by Congress to be raised, from time to time, was to be apportioned among the States according to the aggregate value of the land in the States respectively, exclusive of crown lands.

in that respect, the same as to all; and hence it follows that they must all receive the same construction, in respect to the extent of territory over which they shall be operative, at least so far as their construction in that respect depends upon intention. Moreover, subsections 5 and 6 show conclusively upon their face that they are to be operative only within the States, and subsection 4 shows the same intention with sufficient clearness. Subsection 4 has also the same *raison d'être* as the limitations in subsections 1 and 4 of Section 8, *i. e.*, it was designed to secure a minority of wealthy States against the risk of having the whole burden of government thrown upon them by the less wealthy majority; and, therefore, it is absurd to suppose that it was intended to be operative in territories, — which were never to have any voice in Congress, and as to which, therefore, no such precaution was necessary.

Subsection 8 of Section 9 is more doubtful as to the territorial extent of its operation than any other part of the Constitution, — not because of any intention that can be justly attributed to its authors, but because of the language in which it happens to be couched. Thus, it provides in effect, that no title of nobility shall ever be granted by the United States as a sovereign, and that no person holding office under the sovereignty of the United States shall accept any present, etc. Fortunately, however, this subsection is of little importance, and any doubt that may exist as to its true construction, as it arises from accident, can have no influence upon the construction of other parts of the Constitution.

In respect to the first ten Amendments of the Constitution, it seems scarcely necessary to say more than to refer briefly to the circumstances under which they were adopted. They were proposed by the first Congress and at its first session, and were a concession to the party which had opposed the adoption of the Constitution, and which had thus far prevented its ratification by two of the States, namely, Rhode Island and North Carolina. Some of the States also which had ratified it, had done so only because they had been induced to believe that it would be amended at the earliest opportunity.

In respect to the nature and objects of the amendments adopted, it may be said that they are in the nature of a bill of rights, *i. e.*, they were designed still further to limit and restrict the powers of the new government under the grants contained in the first three articles of the Constitution, and especially those contained in the

8th section of Art. 1. It would be very surprising, therefore, if they should disclose any intention to extend their operation beyond the limits of the States; and in fact they do not disclose any such intention. If any doubt exists as to the extent of territory over which any of them are operative, it is only as to the 1st Amendment,¹ and it arises, not from any doubt as to the intention of its authors, but from the same cause as in subsection 8 of Section 9 of Art. 1. As to the remaining first ten Amendments, the utmost that can be said against the view now urged is that the language in which they are couched is so broad and general as to make them susceptible of an indefinite extension in respect to territory; but that is far from being sufficient to overcome the presumption which exists in favor of their being limited to the States. Moreover, it is as true of the first ten Amendments as it is of the 9th Section of Art. 1, that the intention of their authors was the same as to all of them, so far as regards the extent of territory over which they were to be operative; and yet it is certain that some of them are limited in their operation to the States. Thus, the 6th Amendment provides that all criminal trials shall be by a jury of the "State and district" in which the crime shall have been committed;² and by "district" is here meant either an entire State or a subdivision of a State. So the 7th Amendment perpetuates the right to trial by jury in common-law actions, and declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. It is assumed, therefore, that the common law of England will be the law of the land in every place where this amendment will be operative. Moreover, the operation of the amendment is expressly limited to courts of the United States, *i. e.*, courts exercising some portion of the judicial power conferred upon the United States by Art. 3 of the Constitution; and it is only within the States, as has been seen,³ that such power can be exercised, or such courts can exist. Lastly, the 10th Amendment provides that the powers not delegated to the United States by the Constitution (*i. e.*, in its first three articles), nor prohibited by it to the States (*i. e.*, in Section 10

¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

² U. S. v. Dawson, 15 How. 467.

³ See *supra*, page 378.

of Art. 1), are reserved to the States respectively or to the people (*i. e.*, the people of the respective States); and there could not well be a stronger proof that the sole object of the first ten amendments was to limit the power of the United States in and over the several States. Nor should the fact be lost sight of that these ten amendments as a whole are so peculiarly and so exclusively English that an immediate and compulsory application of them to ancient and thickly settled Spanish colonies would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races, as our bitterest enemies could desire.

It may be added that Art. 3, Section 2, subsection 3, is of the same nature as the first ten Amendments; and yet that subsection is limited, like the 7th Amendment, to the courts of the United States, and so to the several States, and that, too, not only for reasons applicable to the whole of Art. 3, but because it is expressly provided that all trials for crimes shall be held in the State where the crime was committed; and though it is added that, when not committed in any State, the trial shall be at such place as Congress by law directs, yet a crime not committed in a State can come within that subsection only when it is committed on the high seas, or in some place which is without an organized government, and so without the means of administering justice.¹

It must be admitted that the provisions, both of the original Constitution and of the amendments, securing the right of trial by jury, have several times been subjects of discussion in the Supreme Court, and that opinions have been expressed by members of that court that these provisions extend to Territories. But, in the recent case of the American Publishing Co. v. Fisher,² the question was treated as still an open one; and though, in the still more recent case of Thompson v. Utah,³ the court professedly decided that the provisions in question extended to the former territory of Utah, yet it seems clear that the question was not involved in the decision. The only question directly involved was whether the clause in the constitution of Utah, providing that persons accused of felonies not capital should be tried by a jury of eight persons, was *ex post facto* as to a felony committed while

¹ See *U. S. v. Jones*, 137 U. S. 202; *Cook v. U. S.*, 138 U. S. 157, 181. It seems clear also that the Constitution intended that Congress, in directing the place of trial of a crime not committed in any State, should select a place within the limits of some State, as otherwise the trial could not be in a United States court.

² 166 U. S. 464.

³ 170 U. S. 343.

Utah was a territory, and, therefore, inoperative; and that question was decided in the affirmative, and for the reason that the law of the Territory, as it was when the crime was committed, required any person accused of such a crime to be tried by a jury of twelve persons. But, if such was the law of the Territory, it seems to have been immaterial how it was established, — whether by the Constitution of the United States, or by Act of Congress, or by Act of the territorial legislature; and, in fact, such was the law of the Territory by virtue of an Act of the territorial legislature,¹ and therefore it was not necessary for the accused to invoke the aid of the Constitution of the United States.²

It may aid us in determining the status of our new territories to inquire what their status would be, if the United States, instead of being a confederation of States, were a single State, organized substantially as our several States are, or if it were a monarchy, either absolute or constitutional.

The mere acquisition by one country (A, for example) of the sovereignty over another country (B, for example) produces no other legal effect upon the latter than to give it a new sovereign, and consequently to substitute the legislature and the chief executive of A for those of B; but A and B will still be in strictness foreign to each other, each having its own government, laws, and institutions; and though the legislature and chief executive of each will be the same, yet they will act in an entirely different capacity when acting for B from that in which they act when acting for A.³ If any greater change than this is wrought, it will be because A has done something more to B than to acquire the sovereignty over her. She may do with B whatever she pleases, assuming the sovereignty which she has acquired over her to be absolute. She may (for example) incorporate B so completely with A that B's own government, institutions, and laws will cease to

¹ See 170 U. S. 345. Moreover, by the Act of Sept. 9, 1850, c. 51, s. 17 (9 Stats. 435, 458), for organizing the Territory of Utah, it was enacted as follows: "The Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." And though it was not within the power of Congress to extend the Constitution over territory to which it did not extend by its own force, yet Congress could give it the effect of a statute in such territory, and that was the effect of this provision.

² In *Am. Ins. Co. v. Canter*, 1 Pet. 511, 538, Webster, *arguendo*, said Congress had the power to refuse trial by jury to the Territory of Florida. See *supra*, page 382.

³ Hence, no statute made by the legislature of A as such will affect B, unless it expressly declare that it shall extend to B. See *supra*, page 382.

exist, and even she herself will cease to exist as a separate country; or A may keep the two countries entirely separate and distinct, and yet reduce the inhabitants of B to a condition of servitude. But if B be incorporated with A, or the inhabitants of B be reduced to a condition of servitude, it will not be because of the acquisition by A of the sovereignty over B, but because of the action taken by A consequent upon the acquisition of such sovereignty. If, indeed, A have a written constitution, by which her government was created and organized, and under which it acts, and the powers of such government are subject to limitations imposed by the constitution, and such limitations are made by the constitution to apply to all future acquisitions of territory, and so are applicable to B, of course it will follow that the government of A will be subject to the same limitations when acting for B as when acting for A; and A can get rid of these limitations, in respect either to herself or B, only by changing or overthrowing her constitution.

Does, then, the fact that the United States is a confederation of States make any difference? It is conceived that it makes no difference whatever as to the foregoing principles; but it does suggest two observations which affect their application: first, that, as all the limitations imposed upon the United States by the Constitution have reference primarily to the States, and owe their existence primarily to the fact that the sovereignty over the territory of each State is divided between the State and the United States, there is a strong presumption that such limitations have no application to territory which is subject to no State sovereignty, and in which the United States can exercise all the power which can be exercised within a State either by the State or by the United States; secondly, that there is but one known mode of incorporating newly acquired territory into the United States, namely, by admitting it as a State.

Much confusion of ideas has been caused as to the effect of the acquisition of new territory by the United States, by the constant use of the word "annexation,"—a word which has no constitutional or legal meaning. It first came into general use in connection with the agitation for and against the acquisition of Texas. Whether its use was by design or accident may not be certain. The acquisition of Texas was peculiar in this, namely, that it was the first instance (as it is still the only instance) of the acquisition of foreign territory by admitting it as a State. For this reason, the

word "admission" may have been thought objectionable, that word having become associated with the practice of admitting as States territory already within the sovereignty of the United States. The acquisition of Texas was peculiar also in another respect, namely, that it was the acquisition of an independent State with her own consent. In this respect, the case of Hawaii is similar to that of Texas; and this may account for the fact that Hawaii was acquired by the process (so called) of annexation.¹ But, however this may be, the mode in which Hawaii was acquired does not at all affect her *status* when acquired, nor make it different from that of the Spanish islands which have been acquired by conquest and by treaty with Spain.

What has been the practice of Congress in respect to those branches of legislation which the Constitution² requires to be uniform throughout the United States, and does such practice indicate that Congress has held itself bound by the Constitution to make such legislation uniform throughout all territory within the sovereignty of the United States? First, the undoubted fact that there has been hitherto no want of uniformity in the taxes, duties, imposts, and excises laid and collected by Congress, nor in the rules of naturalization, or the laws on the subject of bankruptcies, established by Congress, proves nothing; for there has not hitherto been the slightest reason why legislation upon each of these subjects should not be uniform throughout all the territory over which it extended; nor have there been even two opinions upon the question. Secondly, the earliest legislation respecting duties upon imports and tonnage³ was limited in its operation to the States. This, however, may not have involved any constitutional question, as it did not follow that there was to be "free trade" between the territories and foreign countries, but rather that foreign goods could not enter the territories at all, for want of any ports of entry.⁴

¹ Another point of similarity between Texas and Hawaii is, that both were acquired by joint resolution. The resolution of March 1, 1845, by which Texas was acquired (5 Stats. 797) is entitled, "Joint Resolution for annexing Texas to the United States;" but neither the verb "annex," nor the noun "annexation," occurs in the resolution itself. The resolution of July 7, 1898, by which Hawaii was acquired, is entitled, "Joint Resolution to provide for annexing the Hawaiian Islands to the United States;" and the resolution itself declares "that the said Hawaiian Islands and their dependencies be, and they are hereby annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof."

² Art. I, sec. 8, subsections. 1 and 4.

³ Acts of July 31, 1789, ch. 5 (1 Stats. 29), and Aug. 4, 1790, ch. 57 (1 Stats. 145).

⁴ There was, however, early legislation imposing excise duties, and this was also

The earliest legislation respecting naturalization¹ and bankruptcy² was also limited in its operation to the States; and it seems that this was in violation of the Constitution, if "United States," as used in Art. 1, Section 8, subsection 4, includes the territories; for a consequence was that no person residing in a territory could be naturalized, and that neither any debtor residing in a territory, nor the creditors of any such debtor, could have the benefit of the bankrupt law. Thirdly, all naturalization acts except the first, and all bankrupt acts except the first, have been extended to the territories, but it by no means follows that Congress regarded itself as bound by the Constitution so to extend them. So also the Act of March 2, 1799,³ to regulate the collection of duties on imports and tonnage, was extended to the then existing territories, *i. e.*, the latter were divided into collection districts; and this is true also of all similar acts which have since been passed, and of all territories which have since been acquired; and, if Congress had not taken this course, it must have either prohibited the importation of foreign goods into territories, or it must have admitted all foreign goods free of duty, or it must have established for the territories a revenue system of their own. Moreover, there were many reasons in favor of the course adopted, and none in favor of either of the other three: First, all the different parcels of territory acquired by the United States from time to time (with the unimportant exception of Alaska) were contiguous either to existing States or to territory previously acquired; secondly, none of them differed more widely from the States in soil and climate than the States differed from each other; thirdly, they were all virtually without inhabitants and were expected to be peopled by immigrants from the States, from the British Islands, and from Western Europe; fourthly, they were all expected, at an early day, to be formed into States, and as such to be admitted into the Union; fifthly, none of them produced (to any extent) dutiable articles which, if admitted into the United States free of duty, would either deprive the government of revenue, or compete with home products, or produce both of these effects; sixthly, they all bordered upon navi-

limited to the States. See Act of March 3, 1791, ch. 81 (1 Stats. 199). It seems, therefore, that such legislation was in violation of Art. 1 of the Constitution, Sec. 8, subsect. 1, if "United States," as used in that subsection, includes territories, as no excise duties were imposed upon the latter.

¹ Act of March 26, 1790, ch. 29, 1 Stats. 103.

² Act of April 4, 1800, ch. 19, 2 Stats. 19.

³ 1 Stats. 627.

gable waters through which the products of all foreign countries could easily be imported into them, and, if admitted free of duty, could be smuggled thence into the States.¹

With the acquisition of Hawaii and the Spanish islands, however, all these conditions are radically changed. None of these islands have been acquired with a view to their being admitted as States, and it is to be sincerely hoped that they never will be so admitted, *i. e.*, that they will never be permitted to share in the government of this country, and especially to be represented in the United States Senate. Their agricultural capabilities are very great, their products enter almost wholly into commerce, and all or nearly all of them are dutiable under our tariff. Some of them consist of articles from which the government raises a great amount of revenue, and most of them, if admitted free of duty, will compete ruinously with home products of the same kind. Lastly, none of these islands are manufacturing countries, nor are likely to become such, and none of them import articles which compete with their home products, and, therefore, duties should be levied on articles imported into them only for purposes of revenue.

The strongest possible reasons, therefore, exist for abandoning totally, in respect to our new territories, the practice which has hitherto prevailed of extending to territories the revenue system of the United States, and for giving to each of them a revenue system of its own.² This is required as well in justice to them as in justice to this country; for, while the admission of sugar and tobacco, for example, from those islands into this country free of duty, would ruin the producers of those articles in this country, and would make it necessary for the government to resort to new and oppressive modes of raising revenue, the extension to those islands of our tariff on imports would compel their people to buy

¹ On the 14th of August, 1848, the then military governor of California wrote to the War Department as follows: "If all customs were withdrawn, and the ports thrown open free to the world, San Francisco would be made the depot of all the foreign goods in the North Pacific, to the injury of our revenue and the interests of our own merchants." See *Cross v. Harrison*, 16 How. 164, 183.

² Congress seems to have taken it for granted that the revenue system of the United States was to be extended to the Hawaiian Islands; for the resolution by which those islands were acquired declares that "until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged."

imported articles, not as their interests, but as our interests, dictate.

If we are to undertake the government of dependent countries, with any hope of gaining credit for ourselves, we must enter upon the task with a single eye to promoting the interests of the people governed, and we must content ourselves with such material advantages as may accrue to us incidentally from a faithful discharge of our duty. Does the Constitution of the United States prevent our attempting such a rôle? If it does, one will be driven to the conclusion that the authors of that instrument were either less successful in saying what they meant, or else were less sagacious and far-sighted, than they have had the reputation of being.

C. C. Langdell.

NOTE.

THE numerous editions of the Constitution of the United States vary somewhat in their mode of dividing the different sections into paragraphs, and in numbering the paragraphs. For example, in Art. 1, Section 9, some editions print in one paragraph the matter which, in the preceding article, is treated as constituting subsections 5 and 6; and this, of course, changes the numbering of the remaining paragraphs. So in Art. 2, Section 1, some editions do not number the third paragraph, it having been superseded by the 12th Amendment. Some editions also print and number the form of oath at the end of the section as a separate paragraph. In the preceding article the third paragraph is regarded as numbered, and the form of oath is not regarded as a separate paragraph; and hence the section is referred to as containing eight subsections.

THE CONSTITUTIONAL QUESTIONS INCIDENT TO
THE ACQUISITION AND GOVERNMENT BY THE
UNITED STATES OF ISLAND TERRITORY.

ONE of the most important questions with which the Convention that framed the Constitution of the United States had to deal was that as to the disposition and government of the Western lands, with which the new nation was to be endowed. The Congress of the Confederation had undertaken to determine it for all time in 1784 and again in 1787, but by what authority? Let us turn to the "Federalist" for an answer. Madison there answers very plainly and very truly that they had none. After saying that the cessions of territory then made and which might reasonably be expected, would place a mine of vast wealth in the hands of the new government, he proceeds thus:—

"We may calculate, therefore, that a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become a national stock. Congress having assumed the administration of this stock, they have begun to render it productive. Congress have undertaken to do more: they have proceeded to form new States; to erect temporary governments; to appoint officers for them; and to prescribe the conditions on which such States shall be admitted into the confederacy. All this has been done; and done without the least color of constitutional authority."¹

In the discussions of the constitutional convention there was a decided difference of opinion as to the measure of local self-government to which the settlers on this frontier ground ought to be held entitled. Some favored the policy of the Confederation by which certain fundamental principles were laid down as Articles of compact between the old States and the new territory. Some were for admitting no new States on a footing of equality with the original thirteen. The men of Vermont and of "Franklin" were a rough and turbulent set. There were many who thought they needed to be held in check by a strong government.

The result was the adoption of a clause drafted with the diplomatic skill which was possessed in so rare a degree by Gouverneur Morris. He meant it, he tells us in two striking letters to which

¹ Federalist, No. 38.

Mr. Justice Campbell called attention in the *Dred Scott* case, to serve as a warrant to the new Congress to treat the Western territory and any other that we might acquire in the future as absolute sovereigns. He contemplated as probable the ultimate inclusion of the whole continent of North America in the limits of the United States, and possibly that we might reach out still further, though it was a possibility that he deplored. He meant, to quote his words, that as to all territory outside the original States, we should "govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit, to establish the exclusion. Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made."¹

This section, it is important to remember, is not put in that part of the Constitution which is specially concerned with the legislative department, and in which most of the powers of Congress are particularly specified.

Each of the three great departments is made the subject of a separate article, and then comes the fourth where are gathered together certain rules to govern the relations of the States to each other, the character of their government, and the privileges of their citizens. The third section of this article begins with regulations as to the admission of new States into the Union, and then follows the clause now especially under consideration, which is that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." It is evident that this might not unfairly be understood to refer to the public lands mainly in their character as public property. The phrase "Territory or other Property" certainly implies that "Territory" is to be considered as property. Thus read, Congress would deal with it as representing the owner, rather than the sovereign. In one of its opinions the Supreme Court of the United States seems to look at it from this point of view. "The term Territory," it was remarked, "as here used is merely descriptive of one kind of property; and is equivalent to the word lands."²

¹ *Scott v. Sandford*, 19 Howard, 507

² *United States v. Gratiot*, 14 Peters, 526, 527.

A broader scope, however, had plainly been given it, in an earlier case, while Chief Justice Marshall was on the bench. He was called upon to decide, first, whether foreign territory could be acquired by the United States, and then how, when acquired, it was to be held and governed. These questions had, a quarter of a century before, been hotly disputed in the political department of the government: they were to be hotly disputed again, a quarter of a century later, in the courts before his successors in office. He had no difficulty in confirming, as incident to the executive power, what his great adversary in national politics, who had recently passed away, President Jefferson, had at first hesitated to claim as a right, — the prerogative of acquiring new territory either by conquest or cession from a foreign power.

The legislative department had not shared in Jefferson's doubts. The Louisiana purchase was a political event of far greater importance to the country than any of those which have marked the year 1808. It gave rise to animated discussion in both houses of Congress, but it may fairly be said that neither of the great parties of the day put in question the right of the President and Senate to make the treaty, and so bring the vast territory which it embraced under the sovereignty of the United States. The controverted points were, first, the policy of the measure, and, second, the nature of the relation created between the inhabitants whose allegiance was transferred and the soil itself, on the one hand, and the United States, on the other. It was claimed by some, in debate, to bring them under the flag but not into the Union; to make the people subjects rather than citizens, and the land on which they dwelt the property of our government, but no part, properly speaking, of the United States. We could hold it, they said, and control it, as a man can hold and control a farm which he has bought, by right of proprietorship, to be kept or sold, tilled or left fallow, at pleasure: it was, in short, a proper field for a strictly colonial government. A few asserted that the United States could set up no laws anywhere that were not founded on the consent of the governed.¹

The question thus debated in the Fall of 1803 was a practical and pressing one. France had appointed, in June, a commissioner to deliver possession, and was anxious to get the purchase money into her treasury. The people who were the subject of the transfer

¹ The debates are well summarized in Adams, *Hist. of the United States*, ii, 100-115.

were uneasy and dissatisfied. Expedition was necessary. If in the presence of such conditions all political parties were in agreement as to the main doctrine to be applied, the precedent, as a record of legislative construction on a point of constitutional law is of all the more importance.

The Act of Congress of Oct. 31, 1803, passed by large majorities in each house, to meet the case, was a brief one. It gave the President *carte blanche*. He was authorized to take possession and occupy, using such force as might be necessary to maintain the authority of the United States, and calling out not exceeding 80,000 of the State militia, if he thought proper. Then followed this plenary grant of general authority:

"That, until the expiration of the present session of congress, unless provision for the temporary government of the said territories be sooner made by congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion."

Jefferson immediately despatched commissioners to New Orleans to receive the surrender of possession, and invested one of them, Governor Claiborne, of the Territory of Mississippi, with all the powers theretofore exercised over the Louisiana territory by the Governor General and Intendant under the authority of Spain. This made him a temporary king, and constituted the system of government under which Louisiana remained until October of the following year.

The Governor General, under the laws and usages of Spain, had almost royal authority. He promulgated ordinances which had the force of a statute. He appointed and removed at pleasure commandants over each local subdivision of territory.¹ He presided over the highest court. The Intendant, however, was a counterpoise. He was chief of the departments of Finance and Commerce. He acted as a Comptroller General, on whose warrant only could payments be made from the treasury.² He was also Judge of the courts of admiralty and exchequer. Both these offices Jefferson put in the hands of one man.

¹ Public Documents, 8th Congress. An account of Louisiana, being an Abstract of Documents in the Offices of the Department of State, and of the Treasury, Nov. 1803, 39, 40.

² *Ibid.*, 33, 41.

Judicial proceedings were conducted in the forms of the civil law. A son, whose father was living, could not sue without his consent, nor persons belonging to a religious order, without that of their superior.¹ He who reviled the Saviour or the Virgin Mary, had his tongue cut out and his property confiscated.² A married woman convicted of adultery and her paramour were to be delivered up to the will of the husband, with the reserve, however, that if he killed one he must kill both.³

All travellers, previous to circulating any news of importance, were bound to relate it to the syndic of the district, who might forbid it to go farther if he thought such prohibition would be for the public good.⁴

There was a religious establishment. Two canons and twenty-five curates received salaries from the public treasury.⁵

A considerable code of laws, of which those to which I have referred are not unfair examples, was thus left to be administered or superseded and replaced by others, for an uncertain period, at the will of one man, an agent of the executive power.

The Federalists in Congress, while willing, if not anxious, that Louisiana should be governed as a colonial dependence, objected to the passage of this Act, on the ground that it set up a despotism incompatible with the Constitution. The answer of the leaders of the party in power was that Congress had an authority in the territories which it had not in the States, and that the United States were acting in the rightful capacity of sovereigns, precisely as Spain and France had acted before them.⁶

In the case decided by Chief Justice Marshall twenty-five years later, to which allusion has already been made, that of the American Insurance Company against Canter, the counsel for the defendant, one of whom was Daniel Webster, claimed in argument that the Constitution and laws of the United States did not extend over Florida upon its cession by Spain. The usages of nations, they said, had never conceded to the inhabitants of either conquered or ceded territory a right to participate in the privileges of the Constitution of the country to which their allegiance had been transferred. Congress might therefore govern them at its will.⁷

¹ An Account of Louisiana, &c., App. xxviii.

² *Ibid.*, xlv.

³ *Ibid.*, lxxi.

⁴ Adams' Hist., ii, 119.

⁵ *Ibid.*, xlv.

⁶ *Ibid.*, 38.

⁷ 1 Peters, 533, 538.

The Court, in its opinion, went with them to a certain point, but no farther. Marshall declared that these inhabitants, though made by the treaty of cession citizens of the United States, acquired no right to share in political power; and also that the provision of the Constitution that the judicial power of the United States should be vested in courts of a certain description did not apply to such courts as Congress had provided for Florida. His argument on this, the turning-point of the case, was hardly worthy of so great a judge. The Constitution, he said, required that the Judges of the courts which it contemplated should hold office for good behavior. The Act of Congress for the government of the Territory of Florida set up courts, the Judges of which were to hold office only for four years. Therefore the Constitution did not apply to them. What were they, then? Legislative courts, not exercising any of the judicial power conferred by the people in the grant made and defined in the third article of the Constitution, but having a jurisdiction "conferred by Congress in the execution of those general powers, which that body possesses over the territories of the United States." . . . "In legislating for them, Congress exercises the combined powers of the general and of a State government."

The other legislative powers granted by the people, so far at least as the express terms of the Constitution are concerned, are either limited in scope or else confined to some narrow field of operation. The right to regulate the territories, so far as may be "needful," is given with no other definition of its bounds; and who but Congress is to say how far that need extends? As to them, Congress has, and it was meant by Morris that it should have,¹ every power incident to an independent sovereignty, unless limitations are to be read into the grant from its collocation, and by force of the fundamental principles on which the whole Constitution rests, or of certain of its general prohibitions and guaranties.

The judicial powers granted to the courts of the United States are carefully enumerated, and cover comparatively few of the ordinary controversies that become the subject of litigation. Those which Congress can put in the hands of its deputies for the territories extend over the whole domain of jurisprudence.

The executive power of the United States alone stands as to the Territories on the same footing which it occupies as respects the

¹ *Scott v. Sandford*, 19 Howard, 507.

States. Congress may create territorial offices, but it cannot fill them. Appointments must come from another source, and, so far at least as the leading positions are concerned, are ineffectual until commissions are signed by the President.¹ Probably also he has a power of removal at will even of the judges.² Certainly he has a far greater prerogative. Until Congress acts for the regulation of any particular territory which the United States may acquire, the President is under the constitutional duty to see that the authority of the United States is recognized there and the peace of the United States maintained. If the acquisition be by conquest, its government falls to him from the first as the commander-in-chief of the national forces. If it be by treaty, he must take possession, and control it through such temporary agencies as he may think proper, until Congress sees fit to act.³

Whether there are any provisions in the Constitution, or principles that underlie it, which operate as partial restrictions upon the sovereign authority of Congress over the Territories, is a question which has repeatedly been presented to the Supreme Court of the United States, and to which its response has had a somewhat uncertain sound. In 1850, in a case, turning upon the effect of a territorial statute of Florida, the court spoke thus of territorial governments in general.

"They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine."⁴

This opinion was delivered while political discussion was still rife as to whether Congress could prohibit slavery in the Territories.

¹ Constitution, Article II, Section 3.

² *McAllister v. United States*, 141 U. S. 174, 178; *Parsons v. United States*, 167 U. S. 324, 333.

³ *Fleming v. Page*, 9 Howard, 602; *Cross v. Robinson*, 16 Howard, 164, 193.

⁴ *Benner v. Porter*, 9 Howard, 242.

The Mexican war had stretched our boundaries to the Pacific. The Wilmot proviso, in 1846, brought the question we are now considering into sharp and sudden prominence. General Cass had been made the Democratic candidate for the Presidency in 1848, in view and in no small part in consequence of an open letter to his political friends, written the year before, in which he told them that the right of Congress to regulate the territory and other property of the United States would naturally be construed as merely designed to embrace property regulations; that it had been pushed farther in practice "by rather a violent implication;" but that it was "a doubtful and invidious authority," and "should be limited to the creation of proper governments for new countries, acquired or settled, and to the necessary provision for their eventual admission into the Union; leaving in the meantime to the people inhabiting them to regulate their internal concerns in their own way."¹

The question was a troublesome one for politicians, as well as for jurists. If the Missouri compromise of 1820 was to be upheld, it must be because Congress could rightfully legislate as to the domestic institutions of the Territories. If it was to be broken through by the Wilmot proviso, it was also because Congress had that power.

Some of the Whig leaders now took the ground that the power to legislate for Territories in this and all other matters existed; but was rather one resting on implication than upon express grant. John Davis of Massachusetts defended this doctrine in the Senate, but said that the exercise of the power was to be controlled by the fundamental maxims of the Constitution. Calhoun came nearly to the same position. The "needful rules and regulations clause," he said, "conferred no governmental power whatever." But the Constitution recognized slavery. Slaves were therefore property, so far as the United States were concerned. The citizens of the United States were entitled to free access to every part of its unoccupied territories. They must be allowed to take their property with them. A sovereign State might abolish slavery within its limits. Into that State a slaveholder could not thereafter take this kind of property and hold it in possession. But the Constitution shielded him in the Territories, for they took their political

¹ Letter of Dec. 24, 1847, to A. O. P. Nicholson.

character solely from the United States, and the Constitution was their supreme law.

Davis's colleague was Daniel Webster. He met the issue, in the line of his argument at the bar before Marshall, twenty years before, by denying that the Constitution had any operation in the territories, until Acts of Congress were made to enforce it: it was made for the States, and not for territorial possessions. Benton took the same ground, and maintained it in his "Thirty Years' View," published in 1856.¹

Calhoun had, at an earlier stage of the controversy, in 1848, inveighed in the Senate, in most impressive terms, against all measures looking to the acquisition of new territory to be governed as a political dependency, and had introduced a resolution declaring that to conquer and hold Mexico, "either as a province or to incorporate it in the Union would be a departure from the settled policy of the government, in conflict with its character and genius, and in the end subversive of our free and popular institutions."

While the political anvil was so hot, the Supreme Court wisely confined itself to disposing of the cases before them, without pronouncing upon academic questions, however important. Six years later, however, it adopted a different policy. In the Dred Scott case, Chief Justice Taney announced his adhesion and, so far as he could, committed the court to the doctrine advocated by Calhoun. The "needful rules and regulations clause," he declared, had no operation on territory acquired since the adoption of the Constitution. Such territory was subject to such laws as Congress might enact as the legislative arm of the government; but these must be confined within the limits assigned by the Constitution for the protection of person and property. A power to rule it without restriction, as a colony or dependent province, would be inconsistent with the nature of our government. Slaves might therefore be taken and held there, because slavery was a *status* recognized by the Constitution.²

The court, as reconstituted during the civil war which the Dred Scott decision had done so much to produce or to accelerate, reverted to the doctrine of Chief Justice Marshall, and in 1871 reinstated the "needful rules and regulations clause" as the primary authority for our territorial legislation.³ The right of a sovereign

¹ ii, 714.

² Scott v. Sandford, 19 Howard, 447, *et seq.*

³ Clinton v. Engelbrecht, 13 Wallace, 434, 441, 447.

to rule his possessions, in later decisions has also been relied on, and has perhaps been most emphatically expressed in dealing with the various Acts of Congress passed to suppress polygamy in Utah. The fullest statement of the present view of the court was given by Mr. Justice Matthews, in one of these Utah cases, in which after saying that the question of the power of Congress to legislate for the Territories as to matters of domestic concern is no longer open for controversy, the opinion proceeded thus:—

“It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in *National Bank v. County of Yankton*, 101 U. S. 129. See also *American Ins. Co. v. Canter*, 1 Pet. 511; *United States v. Gratiot*, 14 Pet. 526; *Cross v. Harrison*, 16 How. 164; *Dred Scott v. Sandford*, 19 How. 393. If we concede that this discretion in Congress is limited by the

obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the Act of Congress here in question is clearly within that justification. For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.”¹

It will be remarked that the Dred Scott opinion is here cited as an authority. Mr. Justice Matthews' statement of the law was quoted with approval in 1889, by Mr. Justice Bradley, in deciding the greatest of all the Utah cases — that which held that Congress, as representing the *parens patriæ* of the territory, could annul the charter of the Mormon Church, confiscate its property, and devote it to public uses. He added, however, this important observation of his own: —

“Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.”²

It will be perceived that these few but pregnant words, repeated later with approval in an Alaska case by Mr. Justice Harlan,³ substantially reaffirm a position on which the Dred Scott decision was rested by all the justices but three, and from which none of the other three dissented.⁴ This is that Congress, in making rules for the Territories, is subject to some or all of the restrictions and prohibitions imposed upon it by the Constitution as respects other legislation affecting person or property. A difference is indeed

¹ *Murphy v. Ramsey*, 114 U. S. 44, 45.

² *Mormon Church v. United States*, 136 U. S. 1, 42, 44, 58, 67.

³ *McAllister v. United States*, 141 U. S. 17, 188.

⁴ *Scott v. Sandford*, 19 Howard, 542, 614.

made in the mode of statement. In 1850, the court considered the letter as well as the spirit of the Constitution to have a controlling force. In 1884 what is to be implied or derived from its spirit is treated as the main if not the only source of restraint. This mode of expression may have been adopted in order to leave the way open to hold, should occasion arise, that the United States could not lawfully acquire territory to hold permanently or for an indefinite period as a dependent province or colony. If, however, it means what it seems to declare, and is of general application, then the utterance of Taney on this point seems intrinsically entitled to the most respect. That is in line with what Chief Justice Marshall said in the great case of *Cohens against Virginia*,¹ in discussing the not dissimilar power of Congress to legislate for the District of Columbia, and meeting the objection that such legislation had simply a local effect. "Congress," he observed, "is not a local legislature, but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution. Whether any particular law be designed to operate without the district or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the Constitution, requires a consideration of that instrument. In such cases the Constitution and the law must be compared and construed."

Any other construction leaves the rights of the citizen too much at the will of the judiciary, and ignores the natural meaning of our bill of rights.² The main privileges and immunities guaranteed by the amendments to the Constitution, which serve that office, are shared by every foreigner who may be found within our jurisdiction.³ They must then certainly be the heritage of every settled inhabitant of the land. Such is their force in every organized Territory by Act of Congress (Revised Statutes, Section 1891) and I believe it to be the same in every unorganized territory

¹ 6 Wheaton, 264.

² See Pomeroy, *Constitutional Law*, § 498; Cooley, *Principles of Constitutional Law*, 36.

³ *Wong Wing v. United States*, 163 U. S. 228, 238, 239, 242.

which is subjected to civil government, by virtue of the Constitution itself.¹

If the laws of Congress as to the Territories are laws of the United States and subject in all respects to the Constitution of the United States, how can we justify the long established practice of investing the Territorial legislatures with general legislative power? Here, again, we may turn to Chief Justice Marshall for an answer. The "needful rules and regulations clause," he said in *McCulloch against Maryland*,² authorizes the organization of a territorial government which constitutes a corporate body. Precisely as a State may incorporate a city, with its city council, the United States may incorporate a Territory with a territorial council or a legislature. The statutes of such a body will not be laws of the United States, but laws of that part of it lying within the corporate limits, so far as Congress may have left the field open for their adoption. They are like the laws of our chartered colonies before the Revolution.

Assuming, then, that the Constitution is the supreme law wherever the flag of the Union floats over its soil, are there any of its provisions which are likely to embarrass us in dealing with our new possessions?

That they are islands and not part of the mainland of North America is, of itself, an immaterial circumstance, so far as the right to acquire them is concerned. Islands that fringe a continent are part of it. Puerto Rico and Cuba are American islands.³ Hawaii is in a position to command our coast, and lies nearer to us than the outer Aleutian Island, the acquisition of which has been confirmed by general acquiescence during thirty years. For temporary commercial purposes, indeed, we have the warrant of the Supreme Court for saying that the President, with the authority of Congress, can acquire any island, however remote, and make it, while retained, a part of the United States.⁴ If there is any difficulty in our accepting the cession of the Philippines, it is not that they are islands, but that they are not appurtenant to the American continent.

¹ See *Reynolds v. United States*, 98 U. S. 145, 154, 162; *Thompson v. Utah*, 170 U. S. 343, 346; *In re Sah Quah*, 31 Fed. Rep. 329, 330.

² 4 Wheaton, 316.

³ See a discussion of the Historic Policy of the United States as to Annexation in the Report of the American Historical Association for 1893, page 379.

⁴ *Jones v. United States*, 137 U. S. 202, 212, 221.

Are we then — should the Spanish treaty be ratified — to meet any constitutional difficulty in holding and governing whatever it may bring us?

The XIV. and XV. Amendments must certainly prove a source of embarrassment. The latter declares that the right of citizens of the United States to vote shall not be denied or abridged by the United States on account of race or color. By Section 1992 of the Revised Statutes of the United States, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." This statute was passed, on April 9, 1866, by the same Congress which framed and on June 16, 1866, proposed to the States for ratification the XIV. Amendment, with which, therefore, it may fairly be assumed to have been intended to be in harmony. The first words of that Amendment are that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the State wherein they reside." If this stood alone and unexplained by contemporary legislation, it might be argued that it applied only to persons residing in one of the States. But read in the light of Revised Statutes, Section 1992, it would seem a more natural construction to treat it as adding to that the farther step to which the consent of the States was necessary, that those thus born or naturalized, if they then or afterwards resided in a State, should be citizens of that State, as well as of the United States. It will be observed that the State among whose citizens they are thrust is not necessarily that of their birth. It is any State in which citizens of the United States may at any time reside.

Whether therefore Revised Statutes, Section 1992, should be repealed or not, the XIV. Amendment would seem to make every child, of whatever race, born in any of our new territorial possessions after they become part of the United States, of parents who are among its inhabitants and subject to our jurisdiction, a citizen of the United States from the moment of birth. The Indian tribes on our own continent are held not to be subject to our jurisdiction in the sense in which those words are here employed. They were until 1871 (Revised Statutes, Section 2079) considered as separate nations with which we dealt as treaty powers.¹ Their present condition has been described by the Supreme Court of the United States

¹ *The Cherokee Nation v. Georgia*, 5 Peters, 1.

as "a dependent condition, a state of pupillage, resembling that of a ward to his guardian."¹ Can this same position be assigned to the Malays, the Moros, and the many savage tribes in the Philippines? This will be a grave question for Congress and the courts to meet.² But, however that may be decided, the people of Puerto Rico and the natives of Hawaii will certainly be fully subject to our jurisdiction. Their children, born after the ratification of the Spanish treaty, if it should be ratified, will all be citizens of the United States. They must, therefore, by the XV. Amendment have the same right of suffrage which may be conceded in those territories to white men of civilized races. One generation of men is soon replaced by another, and in the tropics more rapidly than with us. In fifty years, the bulk of the adult population of Puerto Rico, Hawaii, and the Philippines, should these then form part of the United States, will be claiming the benefit of the XV. Amendment.

The provision in the first Article of the Constitution that "all Duties, Imposts and Excises shall be uniform throughout the United States" will also prove an awkward obstacle to any policy of the "open door," if our protective system is to be maintained. It requires that any customs duties we may impose on imported goods shall be of one and the same form and at one and the same rate at every port of entry throughout the United States.³ If there is a duty of forty per cent collectible on woollen cloth brought to New York from a foreign port, the same percentage must be collected on woollen cloth brought to Manila from a foreign port, subject only to any temporary reservations of a right to entry on more favorable terms which may be made in the treaty of cession.

On this point the Supreme Court of the United States had occasion to speak soon after the Mexican war, when California became ours by the treaty of peace, and a contest arose over the right of the temporary government set up by the United States to exact duties on imported goods landed at San Francisco.

"By the ratifications of the treaty," says the opinion, "California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which

¹ *Elk v. Wilkins*, 112 U. S. 94, 99.

² See *United States v. Kagama*, 118 U. S. 375, 380, 384.

³ *Head Money Cases*, 112 U. S. 580, 594.

Congress had passed to raise a revenue from duties on imports and tonnage." ¹

It was contended by the importers that as Congress had not yet made San Francisco a port of entry or constituted any collection district in California the tariff law could not apply. To this the court replied as follows:

"Can any reason be given for the exemption of foreign goods from duty because they have not been entered and collected at a port of delivery? The last became a part of the consumption of the country, as well as the others. They may be carried from the point of landing into collection districts within which duties have been paid upon the same kinds of goods; thus entering, by the retail sale of them, into competition with such goods, and with our own manufactures, and the products of our own farmers and planters. The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there was nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation 'to take care that the laws be carefully executed.' " ²

Many other difficulties of a constitutional character must be encountered, and more than can be noticed in the limits appropriate for an article like this. I will note two which address themselves particularly to the consideration of the political departments of our government.

1. The XIV. Amendment declares that should any State abridge or deny the right of suffrage as to any of its adult male inhabitants who are citizens of the United States, except for crime, its representation in Congress shall be correspondingly reduced.

This applies in terms only to the States; but does it not state a constitutional principle—that of manhood suffrage for every citizen—which the spirit of this Amendment requires us to observe in dealing with our Territories? Such would seem to have been its legislative construction in the Title of the Revised

¹ *Cross v. Harrison*, 16 Howard, 197. ² *Cross v. Harrison*, 16 Howard, 198.

Statutes relating to that subject (Sections 1859, 1860). Can we properly leave the restriction upon the States, and relieve Hawaii from its operation?

It is true that it has never been enforced against the States, but it may be, at the pleasure of Congress, at any time.

2. An objection against the permanent incorporation of the Philippines into the United States remains for consideration which, if sound, is insurmountable.

This nation is the United States of America. That name was assumed on July 4, 1776, by the "Representatives of the United States of America in General Congress assembled," who signed the Declaration of Independence. The first Article of our first Constitution, the Articles of Confederation, is that "The Stile of this Confederacy shall be 'The United States of America.'" The preamble of our present Constitution states its adoption by "the People of the United States in order to form a more perfect Union . . . and secure the Blessings of Liberty" to themselves and their "Posterity." What they did was summarized at the close of the preamble. It was to "ordain and establish this Constitution for the United States of America."

The United States of America is a plural term. The union of separate States in one political body does not extinguish their separate existence, nor vary the force of their having formed this "more perfect union" in order to promote their several as well as their common interests. Can the United States of *America* ever include a State erected on islands off the coast of Asia, and having no possible tie of connection with the American continent? I believe that to this a negative answer may be safely given. Can they, then, annex such islands to a union into which they can never enter on equal terms?

This question cuts deeper than the one propounded to the Supreme Court of the United States in the Dred Scott case. The opinion given there was that we could not acquire any American territory to hold permanently as a dependent province. If that position be unsound, it would not follow that islands appertaining to another continent could be so acquired and held.

To acquire, of course, is one thing, and to keep, another.

I believe we have unquestionable power to acquire the Philippines as the spoils of war; but a conqueror is not bound and may not be able to retain what he receives.

If we should be unable or unwilling to hold them permanently as a colonial dependence, how could we get rid of such possessions?

It would seem logical to hold that the treaty-making branch of the government, by which they were acquired, could by similar proceedings convey them to some other power. So far as a transfer of sovereignty is concerned it could not be accomplished otherwise, unless successful revolt or other political change had made the Filipinos an independent people. To make a grant, there must be some one with whom to close the contract.

But it is the right of Congress to dispose of the territory of the United States, considered in the character of property. To sell or give away any part of the national domain reduces by so much the national resources. As all measures to raise revenue must originate in the House of Representatives, and to stop the revenues from any territory by its alienation would require raising more revenue by taxation, it would seem proper, if not necessary, that the whole of Congress and not merely the President and Senate should concur in any measure that reduced the area of the republic.

Could such a reduction be made either through Congress by law or the President and Senate by treaty, or both together, if it took the shape of a gift to the Filipinos, under which our ownership and sovereignty would pass to them as an independent power? No authority for such a transaction is expressly given in the Constitution. If implied, it would probably have to rest on the assumption that the Philippines had proved a *damnosa hereditas*. There would be greater difficulty in defending it on the ground that we had taken them as an act of humanity to spread the blessings of independent liberty over an oppressed people, after we had elevated and educated them sufficiently to make them fit to use it aright. For foreign missionary work of this kind in another continent, our Constitution contains no provision.

The case of Cuba is, of course, far different. That lies at our doors. It has not been ceded to the United States. Spain has relinquished her sovereignty, but she has not transferred it to us. Our position is to be that of a custodian, or receiver. The sovereignty is, in effect, in abeyance, but it is to pass, by our pledged consent, to the Cuban people, whenever they organize a government for themselves, and show that they can maintain it, and with it the peace and order to which Cuba has been so long a stranger.

Let me briefly summarize the conclusions which, it would seem to me, we must accept.

There is no constitutional objection to the acquisition of any or all of our new possessions, or to subjecting them to a temporary government of military or colonial form.

There is no constitutional objection to our taking temporary possession of Cuba, as a friend of the Cubans, and maintaining peace and order by a military occupation, under the President of the United States, until such time as we may deem its people fit to govern themselves. It is a practical application of the Monroe Doctrine in its modern form.

Until Congress acts, the President can govern our new possessions with no other authority than that with which his great office is clothed by the Constitution in its grant of executive power.¹

If the Spanish treaty should be ratified, Congress could replace the temporary government which the President has set up in Puerto Rico by whatever form of administration it may think proper, not inconsistent with the principles and provisions of the Constitution of the United States, and maintain it until the inhabitants may be fit to govern themselves. No fixed limit of time can be assigned for the duration of such a *régime*. We have held Alaska under such conditions already for thirty years, and she is hardly more deserving of autonomy now than when she was a Russian province. We have held New Mexico, under different forms of administration, for nearly fifty years, and the character and traditions and laws of a Latin race are still so deeply stamped upon her people and her institutions that no demand of party exigency has been strong enough to secure her admission to the privilege of statehood. Here, as in so many other matters where constitutional law and legislative policy may come in conflict, every presumption is to be made in favor of the good faith of Congress and the wise exercise of its discretion.

Upon the ratification of the treaty, Puerto Rico would become (and for the first time become) a part of the United States, but our customs laws would not have full operation there until Congress created the necessary collection districts and ports of entry.² Until then, the temporary government of the President would con-

¹ *Leitensdorfer v. Webb*, 20 Howard, 176, 178.

² *Fleming v. Page*, 9 Howard, 602, 616, 617; *Hamilton v. Dillin*, 21 Wallace, 73, 88, 97.

tinue; duties on imports could be lawfully collected by his agents; and whatever courts of a municipal character he may have set up would continue in the discharge of their functions, with the power of life and death.¹

And here such certainty as can be derived from judicial precedent or settled legislative construction and popular acquiescence comes to an end.

Whether Puerto Rico can be held permanently and avowedly as a colonial dependence; whether the Philippines could be held permanently, whether with or without a view of ultimately dividing them into States to be admitted as such into the Union; whether they could be given over to their inhabitants; whether all trials for crimes committed there must be by jury; whether Cuba, which we have taken in the capacity of a friend or protector, for the benefit of its people, through a war, at the outset of which the public faith was pledged not to acquire it for ourselves by right of conquest, could, should we come at last to despair of their capacity for self-government, be kept as part of the territory of the United States; whether in this republic there can be settled inhabitants of civilized or semi-civilized races owing allegiance to the United States alone, but who can be regarded as subjects and not citizens,² — these are questions unsettled so far as we can consult the oracles of the past, and in view of which the Senate must act, in dealing with the great issue now presented to it as the executive council with which the States have surrounded the President to protect their interests against an undue exercise of executive power.

The last in the list, however, and not the least in importance, while never adjudicated upon by the Supreme Court of the United States, received an answer from one of its most illustrious Judges, by way of an *obiter dictum*, in the first great case in which the construction of the Constitution was involved. This was *Chisholm v. Georgia*, in which the matter in issue was as to how far the ordinary immunity from suit belonging to a sovereign had been stripped from the States by the grant of judicial power to the United States. Mr. Justice Wilson in his opinion, when discussing what sovereignty is, had occasion to consider what is subject to it and used these words:

¹ *Jecker v. Montgomery*, 13 Howard, 498, 515; *The Grapeshot*, 9 Wallace, 129, 133.

² See on this point *Boyd v. Thayer*, 143 U. S. 135, 162, 169; *In re Look Ting Sing*, 10 Sawyer, 353; 21 Fed. Rep. 905.

"In one sense, the term *sovereign* has for its correlative, *subject*. In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. 'Citizen of the United States.' 'Citizens of another State.' 'Citizens of different States.' 'A State or citizen thereof.' The term *subject* occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed."¹

In respect to the mode of trial for crimes committed in Puerto Rico and the Philippines, should they be annexed and civil government established there by Act of Congress, I think it probable though not certain that a jury would be indispensable. Article IV, Section 2, declares expressly that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and this was clearly intended to embrace those committed outside of any State. But this provision is contained in a section dealing exclusively with the subjects of judicial power particularly granted. It is settled (whether logically or illogically) that the courts of Territories do not exercise the power thus conferred. Congress finds its warrant for them in quite different parts of the Constitution, and it is a sufficient warrant for investing them with jurisdiction over every kind of act against the peace of the United States which the laws of the United States may forbid. True, jurisdiction of similar extent may be and has been given under this particular section to the regular courts of the United States; but the source of power under which the different tribunals act is different. The source of power for the ordinary courts gives it with a limitation in favor of trial by jury. The source of power for territorial courts might, I think, be read as giving it with no such limitation. While this would give rather a strict construction to the constitutional guaranty, it would be quite in line with that which the Supreme Court has assigned to other provisions hardly less important, such as that securing the tenure of judicial office during good behavior.

The court, however, made a decision a few years since, which tends strongly in the opposite direction. A man was convicted of a misdemeanor, in the police court of the District of Columbia, upon a trial before the Judge, after a demand for a jury had been refused. He sought relief, by a writ of *habeas corpus*, from confinement under the sentence. The Act of Congress, passed under its authority "to exercise exclusive Legislation in all Cases what-

¹ 2 Dallas, 419, 456.

soever" over the District, which constituted the police court, denied a jury in such proceedings. The Supreme Court of the District had sustained the validity of this statute, and refused to release the prisoner. This judgment was reversed by the Supreme Court of the United States on the sole ground that he had a constitutional right to a jury trial, and their reasons were thus stated:

"There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any one of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases. In the Draft of a Constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of article XI read that 'the trial of all criminal offences (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury.' ¹ Elliott's Deb., 2d ed., 229. But that article was, by unanimous vote, amended so as to read: 'The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct.' Id. 270. The object of thus amending the section, Mr. Madison says, was to 'provide for trial by jury of offences committed out of any State.' ³ Madison papers, 144. In *Reynolds v. United States*, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster v. Reid*, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States."¹

If the views thus expressed are not overruled (and they were reaffirmed with equal positiveness during the last year²), they must lead to the conclusion that no conviction for crime could be had in any of our new possessions, after the establishment there of an orderly civil government, except upon a jury trial.

I think also that by the ordinary rules of construction, the provisions of the third, fifth, and eighth Amendments must be regarded in any form of territorial government which Congress may construct for any part of the United States; including, of course,

¹ *Callan v. Wilson*, 127 U. S. 540, 550.

² *Thompson v. Utah*, 170 U. S. 343, 346.

Puerto Rico and the Philippines, should the pending treaty be ratified, and if, as I have taken for granted, it cedes to us the sovereignty over both.

If not, it must be on the theory that the guaranties which they afford to personal liberty refer only to proceedings had in the exercise of the judicial power of the United States. To read them thus would seem to me to violate the ordinary rule that constitutional provisions for the safety of the individual and the security of property should be favorably and liberally construed.¹ It would also lead to what I should say was the inadmissible assumption that the Amendments set up no checks against executive and legislative power.² The fourth amendment, which guards the people against unreasonable arrests and general warrants, was successfully invoked in an early case before Chief Justice Marshall, arising in the Territory of Orleans. General Wilkinson, who was then in command of the army of the United States, and superintending the fortifications at New Orleans, arrested two men implicated in the Burr conspiracy, and sent them on to Washington for trial. There was a Territorial court at New Orleans before which they might have been prosecuted. Arrived at Washington, they applied for a writ of *habeas corpus*, and were discharged by order of the Supreme Court of the United States, mainly on the ground that they could only be prosecuted where their offence was committed, and so that their arrest was unwarranted by the Constitution.³ Judge Story, in commenting on the decision, remarks that as the arrests were made without any warrant from a civil magistrate, they were in violation of the third amendment.⁴

Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from the sharp and sudden justice — or injustice — which they have been hitherto accustomed to expect, would, of course, be a serious obstacle to the maintenance there of an efficient government.

¹ *Boyd v. United States*, 116 U. S. 616.

² *State v. Griswold*, 67 Conn. 290, 309.

³ *Ex parte Bollman*, 4 Cranch, 75.

⁴ Story, *Commentaries on the Constitution*, § 1895, note.

Every people under a written Constitution must experience difficulties of administration that are unknown to nations like Great Britain, which are unfettered by legal restraints imposed by former generations. It is part of the price it pays for liberty, that new conditions must be dealt with, in fundamentals, under old laws.

The people of the United States, when they framed this Constitution for themselves and their posterity, had they contemplated a day when the Executive might negotiate a treaty of cession embracing an archipelago in the waters of Asia, might have relaxed some of the restrictions which they were laying down to limit the legislative power. They might also have strengthened and multiplied them. They may now be asked to declare their will, through the slow process of constitutional amendment; but until they speak, we must take the Constitution as it is.

Simeon E. Baldwin.

THE THEORY OF LEGAL INTERPRETATION.

THE paper upon the Principles of Legal Interpretation by Mr. F. Vaughan Hawkins, reprinted in Professor Thayer's recently published and excellent Preliminary Treatise on Evidence, induces me to suggest what seems to me to be the theory of our rules of interpretation, — a theory which I think supports Lord Wensleydale and the others whom Mr. Hawkins quotes and disapproves, if I correctly understand their meaning and his.

It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word-book. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing.

How is it when you admit evidence of circumstances and read the document in the light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such a process should be carried very far, but, as it seems to me, we do not take a step in that direction. It is not a question of tact in drawing a line. We are after a different thing. What happens is this. Even the whole document is found to have a certain play in the joints when its words are translated into things by parol evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using

them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.

But then it is said, and this is thought to be the crux, In the case of a gift of Blackacre to John Smith, when the donor owned two Blackacres and the directory reveals two John Smiths, you may give direct evidence of the donor's intention, and it is only an anomaly that you cannot give the same evidence in every case. I think, on the contrary, that the exceptional rule is a proof of the instinctive insight of the judges who established it. I refer again to the theory of our language. By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. If language perfectly performed its function, as Bentham wanted to make it, it would point out the person or thing named in every case. But under our random system it sometimes happens that your name is *idem sonans* with mine, and it may be the same even in spelling. But it never means you or me indifferently. In theory of speech your name means you and my name means me, and the two names are different. They are different words. *Licet idem sit nomen, tamen diversum est propter diversitatem personæ*.¹ In such a case we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said. It is on this ground that there is no contract when the proper name used by one party means one ship, and that used by the other means another.² The mere difference of intent as such is immaterial. In the use of common names and words a plea of different meaning from that adopted by the court would be bad, but here the parties have said different things and never have expressed a contract. If the donor, instead of saying "Blackacre," had said

¹ Bract. 190 a.

² *Raffles v. Wichelhaus*, 2 H. & C. 906. See *Mead v. Phenix Insurance Co.*, 158 Mass. 124; *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 305.

"my gold watch" and had owned more than one, inasmuch as the words, though singular, purport to describe any such watch belonging to the speaker, I suppose that no evidence of intention would be admitted. But I dare say that evidence of circumstances sufficient to show that the normal speaker of English would have meant a particular watch by the same words would be let in.

I have stated what I suppose to be our general theory of construction. It remains to say a few words to justify it. Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual, so far as may be, if instruments are to be used. The question is how far the law ought to go in aid of the writers. In the case of contracts, to begin with them, it is obvious that they express the wishes not of one person but of two, and those two adversaries. If it turns out that one meant one thing and the other another, speaking generally, the only choice possible for the legislator is either to hold both parties to the judge's interpretation of the words in the sense which I have explained, or to allow the contract to be avoided because there has been no meeting of minds. The latter course not only would greatly enhance the difficulty of enforcing contracts against losing parties, but would run against a plain principle of justice. For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense.¹

Different rules conceivably might be laid down for the construction of different kinds of writing. In the case of a statute, to turn from contracts to the opposite extreme, it would be possible to say that as we are dealing with the commands of the sovereign the only thing to do is to find out what the sovereign wants. If supreme power resided in the person of a despot who would cut off your hand or your head if you went wrong, probably one would take every available means to find out what was wanted. Yet in fact we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means. In this country, at least, for constitutional reasons, if for no other, if the same legisla-

¹ In *Nash v. Minnesota Title Insurance & Trust Co.*, 163 Mass. 574, I thought that this principle should be carried further than the majority of the court were willing to go.

ture that passed it should declare at a later date a statute to have a meaning which in the opinion of the court the words did not bear, I suppose that the declaratory act would have no effect upon intervening transactions unless in a place and case where retrospective legislation was allowed. As retrospective legislation it would not work by way of construction except in form.

So in the case of a will. It is true that the testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances.

I may add that I think we should carry the external principle of construction even further than I have indicated. I do not suppose that you could prove, for purposes of construction as distinguished from avoidance, an oral declaration or even an agreement that words in a dispositive instrument making sense as they stand should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church.¹ On the other hand, when you have the security of a local or class custom or habit of speech, it may be presumed that the writer conforms to the usage of his place or class when that is what a normal person in his situation would do. But these cases are remote from the point of theory upon which I started to speak.

It may be, after all, that the matter is one in which the important thing, the law, is settled, and different people will account for it by such theory as pleases them best, as in the ancient controversy whether the finder of a thing which had been thrown away by the owner got a title in privity by gift, or a new title by abandonment. That he got a title no one denied. But although practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end. I am far from saying that it might not make a difference in the old question to which I have referred.

Oliver Wendell Holmes.

¹ *Goode v. Riley*, 153 Mass. 585, 586.

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ANOTHER VIRGINIA COUPON CASE. — The case of *McCullough v. Virginia*, 19 Sup. Ct. Rep. 134, decided last month by the Supreme Court of the United States, is an addition to the law touching the length to which the court may go in reviewing the decision of a State court when there is a question of impairment of contract. It is the last of that large family of cases given birth to by the Virginia coupon legislation of 1871, at the time of the refunding of the debt of that State. New bonds were issued, the State contracting that the coupons annexed should be receivable for all taxes. For twenty-seven years this legislation has been upheld, except as to one sort of tax, which under the Constitution of Virginia was payable only in specie. But during all that time the legislature has done its best to impair the State's agreement. A statute was passed in 1887 providing that only gold, silver, United States treasury notes, and national bank notes, were receivable for taxes; and by virtue of this statute the present plaintiff was refused relief when he took the proper steps to obtain credit, in payment of taxes, for the coupons which he held. The highest court of the State held the entire coupon agreement unconstitutional, the whole vitiated by the part which was formerly held invalid. It was urged that the Supreme Court could not review this decision; but the court has taken the other view, reversed the judgment of the Virginia court, held the funding contract valid, and decided that it is impaired by the later statute.

The decision is noteworthy by reason of the subtlety of the argument which it discountenances. That argument, embodied in the dissenting opinion of Mr. Justice Peckham, insisted, soundly enough, that the court could not review a decision which did not give effect to the statute which was thought to impair the contract. But no statute, he said, was given effect to by the Virginia decision; the contract in regard to coupons was held void, and the law was left as it was before, regardless of statute; coupons were simply held not receivable for taxes, and the judgment made no mention of the later statute. Strange to say, the facts of previous cases give countenance to the idea that the literal decision cannot be looked beyond. The court has always claimed the right, it is true, to

review the decision below as to the existence or scope of a contract whenever one is claimed to have been impaired; but it has seldom asserted this right except when the decision below did in terms give effect to a statute. See *New Jersey v. Wilson*, 7 Cranch, 164; *Bridge Prop'rs v. Hoboken County*, 1 Wall. 46. If Mr. Justice Peckham's reasoning is sound, a broad field is opened for evasions of the constitutional provision. But the reasoning is too stilted. The court has a right to look at the whole record and at all the circumstances. It appeared that throughout the principal case the bone of contention had been the validity of the later statute, and the court could not overlook the glaring fact that the State court did give effect to that statute, although it did not say so. This view is properly a broad one, consistent with the subject with which it deals.

WAYS OF NECESSITY — WHAT ARE THEY? — It is a common impression that a way of necessity may be demanded wherever a landowner finds that he has no access to his property except over the lands of others. That this impression is mistaken is shown by the case of *Ellis v. Blue Mountain Ass'n*, 41 Atl. Rep. 856, decided by the Supreme Court of New Hampshire. There the plaintiff owned a farm situated in the centre of Corbin Park — a game preserve. A public highway running completely through the park was the sole means of access to the farm. The owner of the park prevailed on the town officials to exercise their statutory authority and abolish this highway; whereupon the plaintiff filed a bill to have a way of necessity laid out and to have the park owner enjoined from allowing his wild animals to trespass on the plaintiff's land. The injunction was granted, but the way was refused. The result is peculiar. The farm is carefully protected for the plaintiff's advantage, but he is unable legally to set foot on it. The court place the decision on the ground that while necessity may serve as a basis for an implied grant or reservation, yet where, as here, there can be no question of grant or reservation necessity in itself cannot entitle to a way. In contradiction of this reasoning, the early English cases laid emphasis on the bad policy of tying up lands, and granted ways on the ground "that the public good required that the land should not be unoccupied." *Dutton v. Taylor*, 2 Lutw. 1487. Later this reasoning was doubted by Lord Kenyon in *Hawton v. Frearson*, 8 T. R. 50; and in *Bullard v. Harrison*, 4 Maule & S. 317, Lord Ellenborough held that, where no grant could be implied and where no prescription could be alleged, no degree of necessity could create an easement. The English law is settled in accordance with this case. In America the courts almost without exception have taken the same view. *Tracy v. Atherton*, 35 Vt. 52.

As a matter of principle, the accepted doctrine seems correct. It is harsh dealing to allow one person to impose such a burden upon an utter stranger for private advantage, and without compensation. It is hard to find a principle that will justly determine which of several surrounding landowners, all free from fault, must give gratis to the owner inside. The cases of grants implied from necessity can give no support to the contention against the principal case; for in these cases the way is not given because of the necessity in itself, but because the necessity has come to be considered proof that a way was intended to pass as incident to the

original grant. The fact that the need of a way may suffice to show this intention is no ground for saying it will justify the appropriation of a stranger's land.

Again the reasons of policy set forth by *Dutton v. Taylor* are not so urgent practically as theoretically; as a matter of fact land will rarely remain tied up any length of time for want of a way. There are several remedies. The owner may sometimes, as he would have been allowed to do in this case, enter by license of the other landowner. He may often purchase a right of way. He may petition to have a highway laid out. He may finally be rid of the whole matter by selling out to the adjoining owners. To grant such ways would radically disturb private property rights, and the hardships and injustice incident to this disturbance would seem to outweigh the benefits. It may then be said both on principle and authority that what is generally termed a way of necessity is merely a necessary incident to a grant, that pure necessity in itself cannot authorize the appropriation of another's land, that the right to a way of necessity properly so called does not exist.

DAMAGES FOR MISTAKES IN TELEGRAMS. — The accepted rule as to the damages recoverable for the breach of a contract to transmit a telegram is boldly ignored in a late case. The plaintiff gave to the defendant, a telegraph company, for transmission to his attorneys, a message which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount, and thereby the remainder of the plaintiff's claim was lost. The court assumed in their decision that the defendants are liable for the full amount of this loss. *Western U. T. Co. v. Beals*, 76 N. W. Rep. 903 (Neb.).

In the case of a negligent transmission of a telegram the courts have almost universally applied the general rule of *Hadley v. Baxendale*, 9 Exch. 341, which limits the consequential damages for a breach of contract to those within the contemplation of the parties at the time of entering into the agreement. So in every case the struggle at the trial is to show one of two things: either an actual notice, given by the sender to the operator, of the possibility of special damage, or a constructive notice given to him by the very words of the message. *Western U. T. Co. v. Landis*, 18 Ill. App. 57; *Squire v. Western U. T. Co.*, 98 Mass. 232. Upon the latter point there seem to be two lines of decisions, the first logically adhering to the rule and requiring the message to give the operator specific notice of the possibility of loss, the second holding it sufficient if the business importance of the message appears clearly. *Primrose v. Western U. T. Co.*, 154 U. S. 1; *Postal T. Co. v. Lathrop*, 131 Ill. 575. In either case the remedy is notoriously inadequate. Accordingly, some few courts, not relying upon any principle but frankly recognizing the anomaly, have refused to apply the rule of *Hadley v. Baxendale*, *supra*; *Western U. T. Co. v. Way*, 83 Ala. 542; *Western U. T. Co. v. Reynolds*, 77 Va. 173.

This judicial legislation, and the numerous modern remedial statutes, lead one to question whether the law of damages has been properly applied to the case of the telegram. Damages flowing from a breach of contract are of two kinds, direct and consequential. It is only in the case

of consequential losses that the rule of *Hadley v. Baxendale* is law. But is not the damage in the case in hand direct? The direct loss, as in all cases of breach of contract, is the value of the contract. The telegraph company has failed to deliver the information given to it; the value of the contract lost is, then, the value of the information transmitted. In an analogous case a common carrier without notice is held for the value of a package negligently lost. So in the principal case the court correctly assumes that the measure of damages is the difference between the sum attached for and the debt. A solution of all difficulties, then, would seem to be to recognize that the loss of the intelligence is a direct loss, and that the standard of damages is the inherent value of that information.

CONSIDERATION VALUELESS IN PART.—Where some of the stipulations of an agreement are open to exception in point of legal validity, it is always a difficult problem to determine whether the other provisions are enforceable. The question arose recently in an attempt by a landlord to compel the lessee to perform his agreement under an oral contract for the lease of certain saloon buildings. The lease contained a collateral stipulation that the landlord should refrain from selling cigars upon his adjoining premises. By the local statute of frauds the lease itself was valid, but the collateral provision was unenforceable. Upon these facts the court held the whole contract bad for failure of consideration. *Higgins v. Gager*, 47 S. W. Rep. 848 (Ark.).

It is of much importance, in discussing the present case, to note how many are the possible phases of the problem. Whether the contract is unilateral or bilateral, whether the promisee or the promisor is in alleged default, and whether the part obligation in question is valueless, illegal, or *contra bonos mores*. These distinctions, too often ignored by the courts, make any simple rule impossible. The accepted rules chance to have been developed largely in cases of unilateral contracts where the consideration was in part illegal. In such cases a promisee who has completely performed can require of the promisor performance of those agreements which are legal; but, in the converse case, the performance by the promisee of an illegal act as part consideration is against public policy, nor could such promisee, by performing the legal parts only, call upon the promisor to perform. *City Works v. Jones*, 102 Cal. 506; *Pettit's Admrs. v. Pettit's Distributees*, 32 Ala. 288. These cases of unilateral contracts, where the provisions are in part illegal, are not always carefully distinguished from the cases where the stipulations are in part valueless. In unilateral contracts of this sort, a promisee who has fully performed can, as before, compel the promisor to perform those of his obligations which are enforceable; but further, in this converse case, the performance by the promisee of all the considerations asked, valuable and valueless, is always a good acceptance; for if one consideration performed is valuable the law is satisfied. *Jamieson v. Renwick*, 17 Vict. L. R. 124; *King v. Sears*, 2 C. M. & R. 48.

So much for unilateral contracts; but in the principal case the contract is bilateral. Now the rules governing in unilateral contracts evidently have equal force in bilateral contracts to make enforceable the legal obligations of a party sued, even if part of his obligations be illegal,

and to prevent a party suing from succeeding if part of his obligations are illegal when he must perform precedently. But in the principal case the obligation is at most in part valueless, and by the rules above considered partial worthlessness is immaterial. *Bishop v. Palmer*, 146 Mass. 469. However, in the principal case the plaintiff's promise seems not conditional but independent, and, if so, its unenforceability, even if it amounted to illegality, would not vitiate the contract or invalidate the defendant's obligation. *Tishell v. Gray*, 31 Vroom, 5.

To consider the final ground relied upon by the court: When a promise is unenforceable by the Statute of Frauds does failure of consideration result? A void promise would cause failure of consideration, but this promise is voidable only; the court is in error when it considers it essential to the liability of the party sought to be charged that there be mutuality of obligation. *Justice v. Lang*, 42 N. Y. 493. Consideration alone is requisite, and by the rules above discussed valid consideration is seen to exist in the present case. It seems, then, impossible to support the decision reached.

VENUE AND JURISDICTION IN LARCENY. — It is everywhere the law that, where a thief steals property in one county and is found in another with the goods in his possession, he may be indicted in either, but not in both. *State v. Williams*, 47 S. W. Rep. 891 (Mo.), is no exception to this rule. The defendant stole a steer in Texas County and brought it with him into Pulaski County, where he was indicted for larceny. The court held that the venue was properly laid in Pulaski County on the ground that each transportation of the stolen property by the thief was a new caption. Though the reasoning of the court is questionable, it reaches a sound result. In different counties there is the same law and the same punishment. There is but one offence against a single sovereignty. Venue being a merely formal matter, a thief may be indicted for convenience sake in any county which he enters with the stolen property without prejudice to himself. The decision in the present case, then, may well have been reached without recourse to the fiction of continuing trespass, even if such a doctrine is sound.

The principle of continuing larceny is truly tested when the thief is indicted in a jurisdiction into which he has carried goods stolen in another. The English courts have always disclaimed jurisdiction when the original taking was in another sovereignty. *Regina v. Carr*, 15 Cox C. C. 131 n. In the United States the authorities are divided. *Commonwealth v. Holder*, 9 Gray, 7, proceeding on the analogy of the rule adopted where property is stolen and carried from county to county, decides that the thief may be indicted in whatever State he enters with the goods. *Lee v. State*, 64 Ga. 203, declares, on the other hand, that there is but one offence which exists only at the place where the original trespass occurred. Larceny is the taking and carrying away of the personal property of another *animo furandi*. The act of taking is the essence of the crime. It is evident that, after possession is once complete and continuous in the thief, no subsequent act of his can constitute a new caption from the custody of the true owner. Yet the doctrine of *Commonwealth v. Holder* and kindred cases can rest on no other principle than that every act of possession by the defendant, subsequent to the original change of custody, is

a new trespass on the actual possession of the true owner — which *ex hypothesi* has terminated. The analogy drawn from decisions like the principal case where the goods are carried from county to county is a mistaken one. There the thief can be punished but once. It is really a rule of convenience. If the palpable fiction of continuing trespass be adopted to its full extent, and the defendant make a tour with the stolen property through every State in the Union, there is nothing but death to prevent his retracing his steps in a series of imprisonments.

THE DEFENCES OF A SURETY. — If a creditor gives the principal debtor time for payment the surety is injured because he is deprived of his undoubted right to pay the debt at maturity, and at once sue the principal in the creditor's name. The occasions when this injury will constitute a defence to a suit by the creditor have caused much discussion. In the recent case of *Grier v. Flickcraft*, 41 Atl. Rep. 425 (N. J. Ch.), a surety and his principal had signed a note as joint and several makers. The note itself did not disclose that the relation of suretyship existed, but the payee took the note with notice that this relation did exist. The surety filed a bill to have the collection of the note enjoined because the payee had given time to the principal debtor. The payee claimed that this action could be pleaded as a defence to a suit at law, and that therefore equity had no jurisdiction. The court held they had jurisdiction, reasoning substantially as follows: The creditor took the note with notice that the complainant was only a surety. By so taking it he impliedly agreed to respect the complainant's rights as surety, and contracted not to impair his remedies against the principal. Unless, then, the face of the note disclosed the fact that the relation of suretyship existed, this contract could not be proved at law, for the terms of a specialty cannot be altered by parol. Accordingly it was proper for the surety to seek the aid of equity.

It may be true that equity has a concurrent jurisdiction in cases of this kind, but the position that breach of contract is the basis of the defence, and that it is available at law, only when the suretyship is mentioned in the note seems questionable. Though this position is approved by the courts of Maryland it is disapproved by almost all other jurisdictions. The courts of equity were the first to hold that time given was a defence, and at the start the decisions were based not on the ground that there had been a breach of implied contract, but on the principle that the payee's sole claim was to be paid fully, and that it would be unjust to allow him knowingly to prejudice the surety's remedies against the principal and afterwards also to collect the entire claim. *Nisbet v. Smith*, 2 Bro. C. C. 579 (1789). In 1800 the courts of law began to allow this defence. The subsequent party to a bill was held discharged when time was given a prior party. *English v. Darley*, 2 Bos. & Pul. 61. These early cases at law were also decided on strictly equitable grounds and without mentioning implied contract. *Gould v. Robson*, 8 East, 576 (1807). In 1817 Lord Eldon said that the same principles which discharge the surety in equity now discharge him at law. *Samuell v. Howarth*, 3 Mer. 272. In spite of this start, the courts of law during the next forty years in their desire to be governed by legal, not equitable reasoning, laid hold of certain suggestions in *Rees v. Berrington*, 2 Ves. Jr. 540 (1795), and finally

satisfied themselves that giving time raised strictly a legal defence, that it was a simple breach of contract. *Manley v. Boycott*, 2 E. & B. 46 (1853). The decisions and the doctrine of this period form the basis of the present rule in New Jersey and Maryland. *Vates v. Donaldson*, 5 Md. 389. In England, however, when the statute allowing equitable pleas at law took away the motive for searching out legal reasons for equitable defences, the courts speedily reverted to the original idea, and declared that the implied contract was pure fiction, that the defence was granted solely on the ground that it would be unjust for the creditor to take advantage of the surety's legal liability. *Pooley v. Harradine*, 7 E. & B. 431 (1857); *Greenough v. McClelland*, 2 E. & E. 424. This fact, and the fact that American courts almost unanimously have reached the same conclusion, give strong ground for believing the New Jersey position to be mistaken. This belief is made almost a certainty by a consideration of the long line of cases which, both in England and America, have held that although the creditor first learns of the suretyship relation after he has received the obligation, and therefore after the contract is complete, yet he can do nothing inconsistent with the surety's remedies without discharging him from liability. *Rouse v. Bradford Banking Co.* [1894], App. Cas. 586; *Colgrove v. Tallman*, 67 N. Y. 95. The defence then is equitable, and it would be theoretically correct to refuse to allow it in any case at law. But, as it is settled that it is admissible in one case, it seems illogical not to permit it in all.

CONTEMPT OF COURT. — The law concerning contempt of court is, from the nature of the offence, curiously vague and difficult to classify. A court has the power to punish summarily any person who interferes with its administration of the law. The power is absolute, not subject to review, limited only by the discretion of the court itself. The classification usually made of contempts in and contempts out of court seems of no value. Bishop, *Criminal Law*, 7th edit., Vol. II., § 261. All that can be done is to enumerate various instances of acts which are contempts and show in general with what functions of justice they interfere. The usual form of contempt is obstructing the administrative machinery of a court. A breach of good order in the court room is contempt because it hampers the court in the carrying on of its business; insulting a judge, adverse criticisms of decisions, inciting popular prejudice, *Reg. v. Skipworth*, 9 Q. B. D. 219, all are contempts as tending to bring the court into disrepute and to lessen its dignity and power; disobedience of an order of the court is an obvious offence against its administration of justice.

A different and less common class of contempts interferes with the work of the court in its strictly judicial functions; the ascertaining of law or fact. Tampering with witnesses or juries and the misconduct of juries or the court officers are serious impediments in the course of justice. A recent decision of the Supreme Court of Massachusetts, *The Telegram Newspaper Co. v. The Commonwealth*, *The Gazette Co. v. The Commonwealth*, October Sitting, 1898, manuscript, points out a new offence of a like nature. It appears that one Loring suffered by the taking of land by a town, and an unfortunate newspaper published that "the town offered Loring \$80 at the time of the taking, but he demanded \$250 and, not getting it, went to law." A like statement appeared in another paper. Both were promptly fined for contempt, and their appeal was dismissed. No

question arose as to the truth of the articles. The Supreme Court in the course of their opinion pointed out that the statements were objectionable only because they purported to state the amount of the offers of settlement — that this would not have been admissible in evidence at the trial, and so the natural and probable effect of it was to influence the court and jury improperly in the determination of the amount of damages in the cause. There can be no question of the correctness of the decision, but it is novel and interesting because of the emphasis which is put upon the fact that the offers of compromise which were reported would have been inadmissible as evidence. It is perhaps idle to expect — though not too much to require — that the paper which undertakes to deal with legal matters will make itself acquainted with the general rules of evidence. The case is a sign-post of real value.

CRIMINAL NEGLIGENCE. — The fatalities among infants caused by the vagaries of the sect known as the Peculiar People, a species of Christian Scientists, raise an interesting point in criminal law. At the trial on November 12 last of two of their number for the manslaughter of their infant child, *Regina v. Felton*, noted in *The Law Journal*, Nov. 19, 1898, it appeared that, though the child was ailing from its birth, its parents merely anointed it with oil in the name of the Lord. The post-mortem showed that the summons of a physician would have saved the infant's life. Mr. Justice Hawkins ruled that, if the defendants acted in the honest belief that they were doing their duty, they were not guilty of manslaughter. And so the jury found. The question whether the criminal law should accept the standard of the man of ordinary prudence, adopted on the civil side in cases of negligence, was squarely raised.

Negligence is one way of supplying a sufficient criminal intent to make a criminal act punishable. It is, then, of the first importance that some test be found by which the conduct of each defendant may be measured. There seem two possible rules. The first, which is the doctrine of the English cases, sets up what might be termed an internal standard. A man is judged by the actual condition of his mind as regards consequences — if he does not do his best according to his own lights, he is criminally negligent. *Regina v. Wagstaffe*, 10 Cox C. C. 530. A more recent English decision, while recognizing a common law immunity, was driven to a different result by 31 & 32 Vict. c. 122, § 37, which made it an offence for a parent wilfully to neglect to provide adequate medical aid for a child under fourteen years in his custody. *Regina v. Downes*, 13 Cox C. C. 111. A breach of this duty imposed by law, in itself a crime, supplied all the elements of manslaughter when it led directly to the death of a human being. The repeal of this statute by 52 & 53 Vict. c. 44, § 18, later consolidated with amendments in 57 & 58 Vict. c. 41, cleared the way for the direct application of common law principles to the present case. It is interesting to note that, since Mr. Justice Hawkins' ruling, section 1 of the latter statute has been so construed by the Court for Crown Cases Reserved as to restore the statutory law to the condition in which *Regina v. Downes* found it. *Regina v. Senior*, reported in *The Law Journal*, Dec. 17, 1898. But, apart from statute, the internal standard of guilt is the one adopted at common law by the English courts.

The other rule by which a defendant may be judged is that employed

in cases of civil liability. A dictum in *Commonwealth v. Pierce*, 138 Mass. 165, urges that the conduct of a reasonably prudent man under like circumstances — an external standard — should be the test in criminal cases as well. The way seems clear to choose between these opposing views. It is essential in every common law crime that a *mens rea*, an evil state of mind, concur with a criminal act. To adopt the standard of the community as a measure of guilt would result in the conviction of many who believed they were doing their duty. However conscientious the purpose of an ignorant man, he would be punished merely because he was unfortunate enough to be lacking in ordinary prudence. No one who exercises his best judgment is a fit subject for indictment.

THE OWNERSHIP OF LAKE MICHIGAN. — The rule of the English common law, which gave to the riparian owners the soil beneath non-tidal rivers and all inland waters seemed scarcely applicable to the immense lakes of this country. And in regard to the rights of littoral owners on these inland seas, there has grown up a confused mass of law which is largely the result of local usage — in some jurisdictions the submerged soil goes entirely to the shore owner; in some his property reaches to low water; in others only to high water. The Illinois courts have declared that the soil beneath Lake Michigan belongs to the State — just as at common law the soil of the sea belongs to the crown — and the land of the littoral owner is bounded by high water. The United States Supreme Court in the case of *The Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387, attempted to fasten an exception on this strict rule. That case seemed to declare — practically without authority — that the littoral owner had a right to wharf out into Lake Michigan for the purpose of navigation.

In the recent case of *Revell v. The People*, Chicago Legal News, Dec. 31, 1898, page 157, another analogous claim was made that a littoral owner had a right to build out piers into the lake to prevent the gradual erosion of his land. The Supreme Court of Illinois, however, denied the existence of such a right. They considered the Illinois Central case as discredited in *Shively v. Bowlby*, 152 U. S. 1, and refused flatly to follow it, laying down again the original rule that the State was the absolute owner of the submerged land. The adherence to the strict doctrine seems sound. It gives a definite and intelligible doctrine not likely to be the subject of litigation. It is a hardship that the shore owner may not wharf out to protect himself or to make his land valuable for shipping, especially as the damage from such acts is usually infinitesimal; on the other hand, it is clearly public policy that the State maintain final control of all public waters, and that its ownership be unhampered. The difficulties the question presents are legislative or executive rather than legal, to be met by a temperate administration of the absolute power, with discreet connivance at minor encroachments and a willingness to grant wharfing privileges, rather than by an intricate system of rights.

A CITIZEN'S PRIVILEGES AND IMMUNITIES. — The Federal Supreme Court has lately held invalid a clause of the Tennessee statute providing rules for the incorporation and regulation of certain foreign corporations. The objectionable clause made the property which the corporation held within the State primarily liable for debts due to residents of Tennessee.

By reason of this clause, a citizen of Ohio had his claim postponed; and the court holds that he has been deprived of the privileges and immunities of citizenship in violation of Article IV., section 2, of the United States Constitution. *Blake v. McClung*, 19 Sup. Ct. Rep. 165. The first step that had to be taken in reaching this conclusion was to hold that the preferred class of persons, "residents of Tennessee," comprised in reality "citizens of Tennessee"; otherwise there could be no discrimination against citizens of other States, *qua* citizens. Yet this step is difficult to take in view of the principle that of two constructions a statute should be given the one which keeps it within the limits of the constitution; and it would seem that the majority of the court, who thought the statute invalid if it discriminated against citizens of other States, should have given it the more literal construction unless as so construed it would be hopelessly unreasonable. Cf. Holmes, J., in *Commonwealth v. Perry*, 155 Mass. 117. And hopelessly unreasonable a discrimination is not, which favors residents of the State without reference to citizenship. A greater reason, in fact, might be thought to exist for a legislature's giving protection to all those residing within its jurisdiction than for protecting those residents and non-residents who happened to be citizens of the State.

The taking of this difficult step, however, does not leave the present decision free from doubt; and there is great force in the dissent of Mr. Justice Brewer, in which the Chief Justice concurred. When the State granted the foreign company the favor of incorporation, it could exact certain securities for the protection of its own citizens. For their sole benefit the State might have required pledges. This is admitted by the majority of the court, and in admitting it they seem to admit the whole case. For if the corporation might be required to pledge some of its property, the property pledged might amount to all that the corporation owned within the State. If the legislature could compel this, why should it require the formalities of a pledge or a mortgage? A mortgage consists in acts by the parties to which the law attaches legal consequences; but the legislature has power to enact these legal consequences without prior acts by the parties. That was in effect done in the principal case; certain persons were given a claim to property without the formalities of a mortgage or deposit as security; but the legal consequences are much alike in either case and the attempt made in the majority opinion to distinguish the two is not convincing. So far as justice to foreign dealers is concerned, the incumbrance by statute is as fair as that by act of the parties; a statute on the books is quite as obvious as a record in the registry of deeds. Granted then that the statute protected citizens of Tennessee as such, it is hard to see what deprivation of privileges and immunities was inflicted on the citizens of other States.

RECENT CASES.

ADMIRALTY — JURISDICTION — PERSONAL INJURIES. — A ladder attached to the side of a ship was negligently left in an unsecure condition. The libellant, in attempting to leave the ship by means of the ladder, was thrown upon a wharf and injured. *Held*, that a Court of Admiralty has jurisdiction of libellant's claim for damages. *The Strabo*, 90 Fed. Rep. 110 (Dist. Ct., N. Y.).

Not only is this decision sound, but the true principle upon which these jurisdictional questions depend is well stated. There is much confusion of statement in the cases as

to what is the test to determine when a Court of Admiralty has jurisdiction. In the *Mary Stewart*, 10 Fed. Rep. 137, and in a number of subsequent cases, it is said that the damage must have happened on water. In fact, neither the place where the damage occurs nor the place where the negligent omission of duty takes place determines the jurisdiction. It depends upon the place where the force which produces the damage is applied to the injured person. In certain cases, for example, where a person is thrown from a ship to a wharf, as in the principal case, either a common law or admiralty court may have jurisdiction, there having been two acts of injury, one upon the ship, another upon the wharf. The opinion in the principal case furnishes a safe guide for the determination of future cases.

AGENCY — MASTER AND SERVANT — TORTS. — Plaintiff was injured through the negligent management of a carriage in which defendant was driving. Defendant owned the carriage, horses, and harness. The coachman was a regular employee of a livery stable keeper, who took care of the horses and carriage, and who furnished a driver whenever needed by defendant. *Held*, that a jury might reasonably find that the relation of master and servant existed between the defendant and the coachman at the time of the accident. *Jones v. Scullard*, [1898] 2 Q. B. D. 565.

This decision recognizes the test adopted by the weight of authority in fixing the liability for the torts of a servant, namely, that he is responsible as master who had the authority to control the conduct of the servant in the work in which he was engaged at the time of the accident. Story, Agency, 9th ed., § 453 (b); *McGuire v. Grant*, 29 N. J. Law, 356, 371; *Sprout v. Hemingway*, 14 Pick. 1, 5. In the principal case, if the horses had belonged to the stable-keeper he would be responsible as master, and not the owner of the carriage. *Quarman v. Burnett*, 6 M. & W. 499. In that case the latter could not have given unreasonable orders as to the driving, as the driver would have been warranted in disobeying them in the interest of his own employer, the owner of the horses. As the facts were, the driver would have had no excuse for disobedience beyond a reasonable consideration for his own safety, and so was more completely under the control of defendant. See *Donovan v. Daing, etc. Construction Co.*, [1893] 1 Q. B. D. 629.

CARRIERS — THROWING PACKAGES FROM MOVING TRAINS. — A news agent threw a package of papers from defendant's train while it was passing through a small station, and the package struck and injured the plaintiff. The news agent was not a servant of the defendant, but it was customary to throw packages from the train. *Held*, that a nonsuit is not error. *McGrath v. Eastern Ry. Co.*, 77 N. W. Rep. 136 (Minn.).

The plaintiff must show negligence on the part of the defendant, but even if the act is not done by a servant of the company, the courts hold it liable if the act is done in accordance with a dangerous custom known to the company. *Galloway v. Chicago R. R. Co.*, 56 Minn. 346; *Snow v. Fitchburg R. R. Co.*, 136 Mass. 552. The court in the principal case directed a nonsuit, on the ground that there was no evidence of negligence, since the custom was not dangerous. In a similar case, however, where a company allowed its employees to throw sticks of wood off the train at their various homes along the line, a nonsuit in the lower court was held to be error. *Fletcher v. Baltimore & P. R. R. Co.*, 168 U. S. 135. There is very little authority on the point, but since it is purely a question of fact it is hard to support the peremptory action taken by the court in the principal case, which seems very close to the line.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS — JURISDICTION OF FEDERAL COURT. — By the Funding Act of 1871, the State of Virginia agreed that coupons of certain bonds should be receivable for taxes. By reason of a later statute, forbidding the receipt of anything but legal tender for taxes, plaintiff was refused relief in a suit duly brought to obtain credit for coupons held by him. The ground of the decision was that the original agreement by the State was unconstitutional. *Held*, that the United States has authority to review this decision, since it appears by the record that effect was really given to the later statute. *McCullough v. Virginia*, 19 Sup. Ct. Rep. 134. See NOTES.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EQUAL PROTECTION OF THE LAWS. — A New York statute imposed a tax on the "franchise or business" of all corporations and associations doing business in that State, with an exemption in favor of companies engaged wholly in manufacturing within the State. On a writ of error to the New York Court of Appeals, it was *held*, that this statute does not deny the equal protection of the laws to a Michigan corporation doing business partly in New York, and does not amount to an unconstitutional regulation of interstate commerce. *New York v. Roberts*, 19 Sup. Ct. Rep. 58, 72. HARLAN and BROWN, JJ., dissenting.

The only Federal questions involved were the validity of the tax under the Fourteenth Amendment and under the interstate commerce clause. The discrimination in favor of domestic manufactures is hardly so arbitrary as to be judicially pronounced a denial of the equal protection of the laws. Whether the statute amounts to an unconstitutional regulation of commerce is a more difficult problem. The tax was not laid on the business of selling imported goods, as was the case in *Brown v. Maryland*, 12 Wheat. 419, but upon business of any description. That the amount of such a tax upon a legitimate subject is gauged with reference to non-taxable property, does not impair its validity. *Home Insurance Co. v. New York*, 134 U. S. 594. The effect of the exemption in the statute under consideration is unquestionably the promotion of domestic manufactures; but, so long as interstate commerce is not interfered with, this is a legitimate object. For example, manufacturing plants are sometimes exempted from taxation in order to induce factories to remove from localities where no such immunity is conferred. Although by these means interstate commerce is perhaps indirectly reduced in volume, apparently the validity of such laws has not for that reason been impeached. Upon the whole, therefore, the effect of the New York legislation upon interstate commerce is somewhat too remote to impair its constitutionality.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS. — A Tennessee statute, after providing for the incorporation of foreign corporations of certain kinds doing business within the State, provided that all property owned by such a corporation should be primarily liable for debts due to residents of the State. On postponement of the claim of a creditor, citizen of Ohio, *held*, that he was deprived of the privileges and immunities to which he was entitled by Article IV., § 2, of the Federal Constitution. *Blake v. McClung*, 19 Sup. Ct. Rep. 165. See NOTES.

CONSTITUTIONAL LAW — TAXATION — SPECIAL ASSESSMENTS. — The village of Norwood, Ohio, laid a road through the plaintiff's premises. After paying plaintiff for the land taken, the town assessed that expense, together with the costs of the condemnation proceedings, upon the plaintiff's land, under a provision in the State statute allowing such assessment upon the abutters by front foot. *Held*, that this assessment was unconstitutional, and its collection may be enjoined. *Norwood v. Baker*, 19 Sup. Ct. Rep. 187. GRAY, BREWER, and SHIRAS, JJ., dissenting.

This decision marks the final adoption by the United States Supreme Court of the New Jersey doctrine, that a special assessment levied under a rule which makes it possible that the assessment may exceed the benefit to the land in question is void. *State v. Mayor of Newark*, 37 N. J. Law, 416. The principle that a rule of assessment must not be arbitrary, and must have some relation to the benefits, is sound; but the soundness of the application of the principle in the present case is more doubtful. The legislature has the right to judge of benefits. Computation of them is difficult, and the legislature may well have thought a handy rule desirable. While the rule in question may have been somewhat "rule of thumb," it laid the burden on those who must have been to some extent benefited; the court could hardly say it was so devoid of reason as to be an improper use of the taxing power.

CONTRACT — DAMAGES — MISTAKE IN TRANSMISSION OF TELEGRAM. — A message was given by the plaintiff to the defendants, a telegraph company, for transmission to his attorneys, which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount. In a suit for the loss caused thereby, *held*, that the defendants are liable for the remainder of the plaintiff's claim. *Western U. T. Co. v. Beals*, 76 N. W. Rep. 903 (Neb.). See NOTES.

CONTRACTS — CONSIDERATION VALUELESS IN PART. — A landlord made an oral contract with a tenant for the lease of certain saloon buildings. There was a collateral stipulation that the landlord should refrain from selling cigars upon his adjoining premises. By the local Statute of Frauds the lease was valid, but the collateral provision was unenforceable. *Held*, that the whole contract is bad for failure of consideration. *Higgins v. Gager*, 47 S. W. Rep. 848 (Ark.). See NOTES.

CONTRACTS — VOID CONDITIONS. — A clause in an insurance policy provided that no action thereon should be sustainable at law unless brought within twelve months after the occurrence of the loss. *Held*, that it is against public policy to allow parties to fix a time within which an action may be brought different from that set in the Statute of Limitations. *Omaha Fire Ins. Co. v. Drennan*, 77 N. W. Rep. 67 (Neb.).

The same result has been previously reached in Nebraska. *Miller v. State Ins. Co.*, 54 Neb. 121. *Accord*, *French v. Lafayette Ins. Co.*, 5 McLean, 461. By the great weight of authority, however, the clause in the principal case is held to be valid. 2 Wood, Fire

Insurance, 2d ed., § 460. What consideration of policy or principle of law is offended by such a condition does not seem clear. The Statute of Limitations confers no new right of action but merely restricts the time, otherwise unlimited, within which an existing right may be asserted. It seems to be wholly within the spirit of this enactment, if not in actual furtherance of its design, that parties, in forming a contract, should still further limit the time allowed them for bringing actions thereon. Cf. *Riddlesberger v. Hartford Ins. Co.*, 7 Wall. 386. The holding in the principal case places an apparently unwarranted restriction on a person's freedom to contract.

CRIMINAL LAW — ARSON. — A house was blown up with dynamite, and splinters were torn from the roof and fired by the explosion. *Held*, that this does not constitute arson. *Landers v. State*, 47 S. W. Rep. 1008 (Tex., Cr. App.).

The case raises a novel point. It is clear that the burning of parts of a house already detached, is not arson. *Mulligan v. State*, 25 Tex. App. 199. In the principal case, however, the splinters were set on fire and detached simultaneously. The court, doubtless, reaches a sound result, for even if it could be said that the splinters were fired while a part of the house, still there was no burning of them in the sense of that term as used in connection with arson, till after they were detached. 2 Bish. Cr. L., § 10.

CRIMINAL LAW — CONSTITUTIONAL LAW — ABSENCE OF JUDGE FROM COURT ROOM DURING TRIAL. — During a trial for felony the judge left the court room for twenty minutes without suspending proceedings. *Held*, that a defendant convicted under such circumstances was deprived of his liberty without due process of law, and a new trial must be granted. *People v. Tupper*, 55 Pac. Rep. 125 (Cal., Sup. Ct.).

It is generally held that when the judge has first obtained the consent of the defendant's counsel to leave the court room, or where his absence could not possibly have been prejudicial to the defendant's interests, a new trial will not necessarily be granted. *Pritchett v. State*, 92 Ga. 65; *Tuberville v. State*, 56 Miss. 793. With these exceptions, the courts in such cases uniformly order a retrial. *O'Brien v. People*, 17 Colo. 561; *Hayes v. State*, 58 Ga. 35. From the brief statement of facts it does not appear whether the present case was within the recognized exceptions to the rule; but it seems better, both on theory and in practice, to limit the exceptions as much as possible. The judge is essentially a component part of the court, and anything done in his absence is done in the absence of a complete court and, therefore, without due process of law.

CRIMINAL LAW — LARCENY — VENUE. — A thief stole goods in one county and carried them with him into another. *Held*, that the venue was properly laid in the latter county. *State v. Williams*, 47 S. W. Rep. 891 (Mo.). See NOTES.

DAMAGES — ACTION FOR DEATH. — Plaintiff sues under a statute to recover damages for the death of his mother, caused by defendant's negligence. Not being able to show any pecuniary damage, *held*, plaintiff cannot recover nominal damages. *Lazelle v. Town of Newfane*, 41 Atl. Rep. 311 (Vt.).

Under similar statutes allowing recovery for death, it is almost universally the rule, that no recovery can be had for mental suffering, and no exemplary damages are allowed. *Pennsylvania R. R. Co. v. Vandever*, 36 Pa. St. 298; *Louisville R. R. Co. v. Goodykoonts*, 119 Ind. 111. The courts generally treat these statutes as providing merely a compensative remedy for the pecuniary loss, and under such an interpretation the principal case seems manifestly correct. *Holton v. Daly*, 106 Ill. 131. It is hard to see why nominal damages should be given when no actual damage can be shown, unless the statute declares that death caused by negligence is a cause of action *per se*. Yet most of the American cases hold, contrary to the principal case, that nominal damages can always be recovered. *Howard v. Canal Co.*, 40 Fed. Rep. 195; *Chicago R. R. Co. v. Swett*, 45 Ill. 197. The principal case is, however, in accord with the English rule, and seems correct on principle. *Duckworth v. Johnston*, 4 Hurl. & N. 653.

EVIDENCE — BURDEN OF PROOF — DIRECTING VERDICT. — *Held*, that where one party offers testimony to sustain his burden of proof, the other party, although offering nothing to contradict it, is entitled to have the jury pass upon the case, and a direction of a verdict against him is improper. *Gannon v. Laclede Gas Light Co.*, 46 S. W. Rep. 968; 47 S. W. Rep. 907 (Mo.). Three judges dissenting.

The decision practically overrules the case of *Reichenbach v. Ellerbe*, 115 Mo. 588, and follows the earlier and sounder adjudications in the same State. It is universally held that the court should direct a verdict only when a contrary finding by the jury would be set aside as against the evidence. Profatt, *Jury Trial*, § 354. The dissenting judges necessarily take the position that where the burden of proof is sustained by

uncontradicted testimony, the court must set aside a verdict which is not in accordance with such testimony. The inquiry in all cases where a verdict is sought to be set aside, is whether the jury acted as reasonable men in coming to their conclusion. *The Metrop. Ry. Co. v. Height*, 11 App. Cas. 152. And it cannot be said that the jury, in failing to be convinced by testimony, must have acted unreasonably, simply because such testimony was uncontradicted. Any such view confuses unimpeached testimony with proof. It denies to the jury its acknowledged right to pass upon the credibility of witnesses and, while acting within the bounds of reason, to disregard any testimony that fails to convince.

EVIDENCE — CREDIBILITY OF WITNESS — CONTRADICTING ONE'S OWN WITNESS. — In an action on a lease, plaintiff alleged that the instrument was in the possession of defendants. To prove this, and the original execution, plaintiff called an agent of defendants with whom he made the lease and in whose possession he had last seen it. Later, defendants called the same witness, who testified that the paper was not a lease. On cross-examination, plaintiff, to discredit the witness, proposed to ask him whether he did not, after soliciting the lease, tell others that he had leased the land. *Held*, that the question should have been allowed. *Morris v. Guffey*, 41 Atl. Rep. 735 (Pa.).

The lower court refused to allow the question, on the ground that, by calling the witness, plaintiff made him his own witness, and therefore could not discredit him. That a party cannot discredit his own witness is well established. *Pollock v. Pollock*, 71 N. Y. 137. The higher court said that as it was necessary to call the witness to account for not producing the lease, plaintiff did not give credit to him. Where the witness is not one of the party's own selection, but is one selected by the law as necessary to prove a particular fact, as in the case of a subscribing witness to a deed or will, he can hardly be considered as the witness of the party calling him, and therefore his truthfulness may generally be attacked. *Crocker v. Agenbrood*, 122 Ind. 587. The witness in the principal case was not one whom the law obliged plaintiff to call, and the ruling seems to be an unwarranted extension of the exception, that will to a great extent destroy the force of the original rule.

INSOLVENCY — DISCHARGE — ACTION BY FOREIGN CORPORATION. — Plaintiff, a foreign corporation, established an office in Massachusetts, and procured a license for the sale of its goods. It also, in accordance with the law, appointed the commissioner of corporations its attorney, upon whom all lawful process in any action against it might be served. Defendant bought goods of plaintiff at its local office, and afterward obtained a discharge in insolvency under the Massachusetts insolvency laws. Plaintiff did not prove its claim, but subsequently brought an action. *Held*, that the discharge is not a bar to the action. *Bergner & Engel Brewing Co. v. Dreyfus*, 51 N. E. Rep. 531 (Mass.).

The terms of the insolvency statute, as well as of the discharge itself, are broad enough to bar the plaintiff's claim. Pub. St., c. 157, sec. 81. But the United States Supreme Court has held that a discharge in insolvency by a State court is not a bar to an action by a creditor of another State who does not come in to prove his claim. *Baldwin v. Hale*, 1 Wall. 223. The grounds urged for exception in the present case are that the plaintiff had an office in the State, held a license granted by the State, and had appointed the commissioner of corporations its attorney on whom lawful process might be served. It is settled in Massachusetts that a creditor of another State, merely because he does business in Massachusetts, is not barred by a discharge of his debtor, if his claim is not proved in the insolvency proceedings. *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. A corporation has its domicile in the State which created it, and consequently it has no domicile elsewhere. *Boston Investment Co. v. City of Boston*, 158 Mass. 461. On principle it seems that a discharge should bar a claim by a corporation having a regular place of business in the State on a contract made within the State. However, the decision is within the principle of the earlier Massachusetts cases, and is correct on authority.

INSURANCE — CONSTRUCTION OF ACCIDENT POLICY. — An accident insurance policy contained a provision that the insurance did not extend to death resulting from poison. The insured took poison under the mistaken belief that it was harmless medicine. *Held*, that the case is covered by the excepting clause and the insurer is not liable. *McGlather v. Prov. Mut. Acc. Ins. Co.*, 89 Fed. Rep. 685 (C. C. A., Eighth Cir.). One judge dissenting.

The decision is supported by the weight of authority, although in several jurisdictions a contrary result has been reached. *Early v. Standard Life & Acc. Ins. Co.*, 71

N. W. Rep. 500 (Mich.); *Healey v. Mut. Acc. Ass.*, 133 Ill. 556. The construction placed by the court upon the excepting clause appears to be in accordance with good sense and sound reason. The dissenting judge finds a conclusive analogy between the principal case and those cases in which it has been held that the exception in an insurance policy of death from inhaling gas covers voluntary inhaling only. *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472. The result reached in those decisions is forced and technical but, granting their soundness, they cannot be said to conclude cases like the present. It was found necessary in those cases to hold that the word "inhaling" implied a voluntary act, but no such notion can be imputed to the clause "resulting from poison," and hence the analogy fails.

MASTER AND SERVANT — WRONGFUL DISCHARGE — MEASURE OF DAMAGES. — The plaintiff entered into a contract to serve the defendant for a year. He was wrongfully discharged at the end of two months, and brought an action against the defendant before the expiration of the year. *Held*, that the measure of damages is the amount of the plaintiff's wages to the time of the trial, less what he had been paid and what he could have earned by reasonable efforts between the time of his discharge and the time of trial. *Sommer v. Conhaim*, 54 N. Y. Supp. 146 (Sup. Ct., App. Term).

The doctrine of this case is contrary to the English decisions and to the weight of American authority, and is wholly indefensible in principle. However, it has some support. *Gordon v. Brewster*, 7 Wis. 355; *Association v. Wiedenman*, 28 N. E. Rep. 834 (Ill.); *Van Winkle v. Salterfield*, 58 Ark. 617. The court base the refusal to allow a recovery for damages that may accrue between the time of trial and the expiration of the term of employment, upon the argument that such damages are so uncertain and contingent as to make it unsafe to attempt to estimate them. The argument is equally applicable in actions of tort for personal injuries in which prospective damages are constantly estimated. *Curtis v. The Rochester, etc. R. R. Co.*, 18 N. Y. 534. The objections to such a rule are obvious. The employee must elect to bring his action immediately upon his discharge and thus lose a large part of the damages to which he is entitled, or he must wait until the expiration of the term, and thus run the risk of loss of evidence and the solvency of his employer. Indeed, in certain cases he may be forced to sue before the term expires or have his action barred by the Statute of Limitations. As a matter of fact, while it is always essential that the damage should flow certainly from the defendants' wrongful act, certainty in the amount of the damage is never requisite to a recovery.

PERSONS — DIVORCE — ATTORNEY'S FEES. — Plaintiff, an attorney, commenced a divorce suit for a wife, but the suit was dismissed through the collusion of the husband and wife, without the plaintiff's knowledge. *Held*, that the plaintiff is entitled to recover reasonable attorney's fees from the husband in an action at law. *Ceccato v. Deutscham*, 47 S. W. Rep. 739 (Tex., Civ. App.).

It is generally held in this country that the compensation by the husband of an attorney for services rendered to the wife in conducting a divorce suit, is a matter solely within the discretion of the divorce court. *Wescott v. Hinckley*, 56 N. J. Law, 343. The reason given is that the contract of marriage is indissoluble at common law, and the husband cannot therefore be put under a legal obligation to provide for its dissolution. *Shelton v. Pendleton*, 18 Conn. 417. The principal case, however, is in accord with the English decisions, which hold that such services are within the common law definition of necessities. *Brown v. Ackroyd*, 5 E. & B. 819. This rule seems to be sound. Legal services essential to relieve the wife from physical or mental distress occasioned by the husband, are held to be necessities for the wife. *Conant v. Burnham*, 133 Mass. 505. And services essential to secure or prevent the annulment of the contract of marriage, seem equally necessary. Otherwise the wife might be unable to obtain counsel to adequately enforce her rights.

PROPERTY — EJECTMENT — RESERVATION OF TITLE. — The plaintiff contracted to sell the defendant railroad company a right of way over his lands, reserving title to himself until the notes given for the purchase money should be paid. *Held*, that the plaintiff cannot maintain an action of ejectment after the railroad company, with the plaintiff's consent, has built its track across the land, even though the notes are unpaid. *Atlanta, Knoxville, etc. R. R. Co. v. Barker*, 31 S. E. Rep. 452 (Ga.).

This is well settled law, and is based upon principles of public policy. In the present case actual authority was given to the railroad company, but it has been held that even where there was no actual authority, but where the individual merely acquiesced in the building of the road across his land as part of a continuous line, he is estopped from afterwards bringing an action of ejectment, even though he still

retains the title to the land. *Porter v. The Midland R. R. Co.*, 125 Ind. 476; *Thornton v. Cairo & Fulton R. R. Co.*, 31 Ark. 394. A railroad is charged with duties to the public, and, for the sake of the public interests involved, an individual, in a case like the present one, will be restricted to such remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. The case will naturally be different when the owner has not acquiesced in the act of the railroad company, but has, at all times, used reasonable diligence to protect this property from the unlawful entry. *Denver & S. F. R. R. Co. v. School Dist. No. 22*, 14 Colo. 327. In actions between individuals, the public interest not being involved, this principle would, of course, be inapplicable. *Alston v. Wingfield*, 53 Ga. 18; *McDaniel v. Gray*, 69 Ga. 433.

PROPERTY — INJUNCTION — COMMON-LAW COPYRIGHT. — Complainant society filed a bill to enjoin defendants from using, as an advertisement of a medicine, extracts from a committee report read at a meeting of complainant society. By affidavits it appeared that persons were present at the meeting who were not members, but it did not appear that the meeting was open to the general public. On a motion for a preliminary injunction upon the affidavits, *held*, that publication of the report is not shown, and complainant is entitled to the relief asked. *New Jersey State Dental Society v. Denticura Co.*, 41 Atl. Rep. 672 (N. J., Ch.).

A common law right of property in an unpublished writing, whatever may be the theoretical objections to it, is generally recognized in this country. *Tompkins v. Hallock*, 133 Mass. 32. But *cf.* PARKE, B., in *Jefferys v. Boosey*, 4 H. L. Cas. 815, 919. Publication then is held to dedicate this property to the public. No such dedication is found in the principal case, and the conclusion seems correct. Too much stress is perhaps laid on complainant's intention not to dedicate; no one who publishes a book intends to part with the work itself, as a piece of literary workmanship. Nor is the fiduciary position of the hearers of much importance as touching the mere fact of publication. The owner of the writing is the person to look at; what he did is the question. Under all the circumstances, the act of complainant society in the principal case hardly constitutes an abandonment to the public at large. See 12 HARV. LAW REV. 51.

PROPERTY — WAYS OF NECESSITY. — The plaintiff's land was entirely surrounded by the defendant's park. The sole mode of access was by a highway, and the highway was later extinguished by the proper authorities. *Held*, that the plaintiff has no right to a way of necessity over the defendant's land. *Ellis v. Blue Mountain Forest Assn.*, 41 Atl. Rep. 856 (N. H.). See NOTES.

QUASI-CONTRACTS — MONEY PAID FOR ILLEGAL PURPOSES. — The defendant falsely represented to the plaintiff that a criminal prosecution had been instituted against the latter, and obtained money from him to bribe the prosecuting officer to stop proceedings. *Held*, that the plaintiff can recover the money. *Smith v. Blachley*, 41 Atl. Rep. 619 (Pa.).

The decision seems correct. The plaintiff's illegal intention in giving the money to the defendant should not bar his recovery unless it is against public policy. The test applied by the courts in similar cases seems to be, whether recovery will give effect to the illegal transaction, or whether it will prevent its performance. Thus in the analogous case of money paid under an illegal contract, it is generally held that the money can be recovered at any time before the contract is performed. *Spring Co. v. Knowlton*, 103 U. S. 49; *Duval v. Wellman*, 124 N. Y. 156; *Taylor v. Bowers*, 1 Q. B. D. 300. But when the illegal transaction is partly or wholly performed, the courts will not allow either party to take advantage of its illegality, and therefore money paid under it cannot be recovered. *Kearley v. Thomson*, 24 Q. B. D. 742; *Tyler v. Carlisle*, 79 Me. 210. In the principal case the money had never been applied as the defendant represented, and since the plaintiff did not rely on any illegal contract, and the transaction was still unperformed, recovery was properly allowed. *Catts v. Phalen*, 2 How. 376.

RECEIVERSHIP — EQUITABLE CHARGE ON INCOME. — A telegraph and telephone company went into the hands of a receiver. *Held*, that operators have a claim against the company, for wages for ninety days preceding the appointment of the receiver, superior to the lien of the mortgage debt. *Keelyn v. Carolina, etc. Telegraph Co.*, 90 Fed. Rep. 29 (Cir. Ct., S. C.).

This decision extends to telegraph companies a doctrine heretofore applied only to railroad companies. The leading case, illustrative of the principle, which is of very recent growth, its *Fosdick v. Schall*, 99 U. S. 235. A railroad is deemed of such great

public interest that the courts have looked with favor on the claims of those furnishing material or labor necessary for its operation. When, therefore, courts of equity have exercised their jurisdiction in the appointment of a receiver, they have recognized the right to priority of the "current supply claimant." The case is one of conflicting equities, and the principle laid down is, that the net income, to which the lien of the mortgagee attaches, is subject to an equitable charge in favor of claims, coming under the head of current indebtedness, which have accrued before the appointment of the receiver. *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776; *Virginia, etc. Co. v. Central, etc. Co. of Georgia*, 170 U. S. 355. The same considerations which have influenced the courts in applying this doctrine to railroad companies justify the holding of the principal case in applying it to telegraph companies.

SALES — BILL OF LADING — PASSING OF TITLE. — While goods were *in transitu* the consignor sold them and drew on the buyer. He deposited the draft with the payee bank, together with the bill of lading indorsed to the buyer conditionally upon payment of the draft. The buyer paid the draft and received the bill of lading without notice of an intervening attachment of the goods as the consignor's property. *Held*, that the attachment was good. *Kentucky Refining Co. v. Globe Refining Co.*, 47 S. W. Rep. 602 (Ky.).

The court erroneously treats property and *jus disponendi* as necessarily synonymous. See Lord Cairns in *Ogg v. Shuter*, 1 C. P. D. 47; Lord Bramwell in *Mirabita v. Bank*, 3 Ex. D. 164. The time when title passes depends upon the intention of the parties as shown by all the facts. Benjamin, Sales, 4th Am. ed., § 308, *et seq.* It would seem better here to hold that title passed at the time of the contract of sale, since the goods were specific and ready for delivery, and the bill of lading already made out. The later dealing with the bill of lading shows only an intention by the seller to retain a *jus disponendi*, a power of controlling the possession of the carrier to secure payment of the purchase money. See above cases. This would make the attachment void. See *Peters v. Elliott*, 78 Ill. 321, where on similar facts this result is reached on the more prevalent American view that a bill of lading represents title. The dealing with the bill of lading is treated like a mortgage to the vendee to secure future advances, the vendee's title to the goods, acquired by payment of the draft, relating back to the time of the deposit of the bill of lading with the bank.

SALES — STOPPAGE IN TRANSITU — BONA FIDE PURCHASER. — A sold goods to B, who resold them to C in part payment of a pre-existing debt. A shipped them to C, deliverable to C's order by the bill of lading, which was sent to B. Before it was transferred to C and before the goods were delivered, B became insolvent. *Held*, that A could not stop the goods. *Shepard & Morse Lumber Co. v. Burroughs*, 41 Atl. Rep. 695 (N. J., Sup. Ct.).

The court held that the *transitus* was not at an end, but that the delivery by A to B of a bill of lading drawn in the name of C was a delivery for C's benefit, and was as good as a delivery to C himself, and, lastly, that the satisfaction of a pre-existing debt is sufficient consideration for the transfer of a bill of lading to cut off the vendor's right of stoppage *in transitu*. On the first point the court is undoubtedly right. *Bethell v. Clark*, 20 Q. B. D. 615. Probably also on the last. *Leask v. Scott*, 2 Q. B. D. 376; *Lee v. Kimball*, 45 Me. 172. Benjamin, Sales, 4th Am. ed., § 866. On the second point, however, the court seems to be wrong. The bill of lading must be delivered by the vendee to the sub-vendee to defeat the vendor's right of stoppage *in transitu*, unless there comes in an element of estoppel not shown in this case. *Ex parte Golding*, 13 Ch. D. 628; *Kemp v. Falk*, 7 App. Cas. 573; Benjamin, Sales, § 862 (c), (d), 865 (a).

SURETYSHIP — DISAFFIRMANCE BY MINOR — SURETY'S LIABILITY. — The defendant was surety on a note, which was given by a minor in payment of certain property. Upon attaining his majority, the minor disaffirmed the contract and returned the property. *Held*, that defendant is not liable on the note. *Keokuk Co. State Bank v. Hall*, 76 N. W. Rep. 832 (Iowa).

The decision is rested upon the authority of *Baker v. Kennett*, 54 Mo. 82. The court, in departing from the recognized principle that the surety of an infant is bound, although the principal disaffirms his contract, is influenced by the apparent injustice of allowing the creditor to retain his property and at the same time recover the purchase price from the surety. But this difficulty can be avoided without denying the application of the general rule. A surety, upon discharging the obligation, is subrogated to the rights of the creditor against the principal, and, accordingly, the defendant in the present case would, upon payment of the note, acquire all of the creditor's rights to the property. By proceeding upon this theory, any loss due to a depreciation of the prop-

erty would not, as here, fall upon the creditor, but upon the surety, which is clearly a more equitable result.

SURETYSHIP — NATURE OF DEFENCES. — A surety on a note, which on its face showed him to be liable as a principal, filed a bill to enjoin its collection on the ground that time had been given to the real principal. *Held*, that the suit was properly brought in equity, as the facts show no defence to an action at law. *Grier v. Flücraft*, 41 Atl. Rep. 425 (N. J., Ch.). See NOTES.

TORTS — CEMETERIES — TRESPASS. — *Held*, that one having the right of burial in a lot which is part of a public cemetery, can bring trespass *quare clausum fregit* against the owner of the fee for a disturbance thereof. *Hoff v. Olson*, 70 N. W. Rep. 1121 (Wis.).

There is but scant authority on this point. The action has been allowed when the trespass was committed by a stranger. *Smith v. Thompson*, 55 Md. 5. And the principal case has the direct support of one other decision. *Bessemer, etc. Co. v. Jenkins*, 111 Ala. 135. The owner of a lot in a public cemetery is generally regarded, in this country, as having only a license to bury therein to the exclusion of others. *Page v. Symonds*, 63 N. H. 17. While a court might be justified in allowing the action of trespass to such a licensee against a stranger, on the ground of possession, still, to allow it against the owner of the fee can hardly be reconciled in any way with legal principle.

TORTS — DECEIT — MISREPRESENTATION AS TO INTENTION. — The defendant persuaded the plaintiff to convey land to him on a promise to supply the plaintiff with certain live stock, etc. The defendant did not supply the live stock, and, in fact, never intended to keep his agreement. *Held*, that an action of deceit will lie. *McCready v. Phillips*, 76 N. W. Rep. 885 (Neb.).

It is well settled that a false representation, in order to form the ground for an action of deceit, must be of some past or existing fact. Some jurisdictions hold, contrary to the present case, that a false representation as to a matter of intention, or a promise to perform an act made with the intention not to perform is not a misrepresentation of an existing fact upon which an action of fraud may be founded. *Dave v. Morris*, 149 Mass. 191; *Farris v. Strong*, 48 Pac. Rep. 963 (Colo.). The better opinion seems to be, in accord with the present case, that an action of deceit will lie. In the oft-quoted words of Lord Bowen, in *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459, "the state of a man's mind is as much a fact as the state of his digestion," and a misrepresentation as to this state of mind is, therefore, a misstatement of an existing fact. *Swift v. Rounds*, 19 R. I. 527; *Stewart v. Emerson*, 52 N. H. 301.

TRUSTS — FRAUD BY AGENT — STATUTE OF FRAUDS. — Defendant orally agreed to act as agent for plaintiffs to purchase certain land in their name. He, however, had the conveyance made out to himself, paid for it with his own money and denied the agency. *Held*, that defendant is liable to plaintiffs as trustee *ex maleficio*. *Halsell v. Wise County Coal Co.*, 47 S. W. Rep. 1017 (Tex., Civ. App.).

There is much authority holding that the defendant is not liable on these facts, on the ground that the trust is created by the agreement of agency, and so is within the section of the Statute of Frauds requiring declarations of trusts in land to be in writing. *Burden v. Sheridan*, 36 Iowa, 125; *Nestal v. Schmid*, 29 N. J. Eq. 458. The result in the principal case seems more just and to be reached by sounder reasoning. Agency, though created by an agreement, is properly a relation or status, which, for a particular purpose, is fiduciary, and involves the devotion of the agent to his principal's interests. An abuse by the agent of this fiduciary relation is a fraud on his principal, and renders him liable for the proceeds of his wrongful act as a constructive trustee. This trust, then, really results by operation of law, and so is not within the Statute of Frauds. *Browne*, Statute of Frauds, § 96; *Winn v. Dillon*, 27 Miss. 494; *Jenkins v. Eldredge*, 3 Story, 181, 290.

REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. By James Bradley Thayer. Boston: Little, Brown & Co. 1898. pp. xxxvi, 636.

It is a bold thing to say of a book that it expresses what has not been said before; but two things Professor Thayer emphasizes which before

now have had but a fragmentary expression. First is the point that our rules of evidence are neither logical nor wholly reasonable, but are, with their virtues and vices, true offsprings of the trial by jury. They are rules of convenience introduced *per doubt del lay gents*. Trial by jury, then, must first be understood; and in a complete and thorough manner the author traces it, step by step, illuminating his work with illustration. From the old trials, where the jurors knew the events they were trying, the growth of the conception of witnesses is traced, until rules became necessary for the giving of the testimony. Old rules are called on to explain what seem now to be anomalies; and among these anomalies is shown the so-called Best Evidence Rule. History, from this point of view, is now written for the first time, and written in a masterly and luminous style.

A second and equally important preliminary step is the discrimination between what is and what is not a rule of evidence. This leads to discussing Burden of Proof, Presumptions, carefully and conclusively, but from an unchanging standpoint — they do not involve rules of evidence. Especially full is the treatment of the various rules of law misnamed the parol evidence rule, and much time is devoted to their application to wills. It is impossible to go into the mooted question as to whether the Court, in construing a will, really looks to the testator's intention, as the author believes, or whether it holds intention wholly irrelevant. This question, at all events, is not one of the law of evidence, except so far as it deals, under Professor Thayer's views, with the rule excluding, in most cases, direct statements by the testator of his intention.

Having cleared the ground of this mass of spurious undergrowth, the author is ready to treat of the law of evidence proper, and the preliminary gives good promise for the further work. But in the last chapter he pauses to glance over the law of evidence as a whole, points out its failings, and suggests a remedy. This he finds in the discretion of the judge. A recognition of such increased judicial power may be hard to obtain in this country; but the wisdom of a change along this line is clear. Legislative reform of law is often a bungling affair, not likely to be carried out with the nicety which the present subject requires; and no one who has seen the workings of an English *nisi prius* court, in which the judge has wide discretion and debates on points of evidence are rare, can doubt that this power, wielded by competent hands, could accomplish beneficial results.

J. G. P.

LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. Delivered before the Dwight Alumni Association by William D. Guthrie. Boston: Little, Brown & Co. 1898. pp. xxviii, 265.

This series of lectures is interesting, and the treatment of the subject scholarly. The history of the Fourteenth Amendment is told, and the scope and meaning of its terms are carefully discussed. Particularly satisfactory is the treatment of "due process of law." Full weight in that connection is properly allowed to the general usages of mankind, and great discretion is conceded to belong to legislatures, so long as their power is not arbitrarily used. It may well be regarded as an error to support the decision — *C. B. & C. R. R. v. Chicago*, 166 U. S. 226 — that

in the absence of a clause in a State constitution corresponding with the Fifth Amendment, a State may not take property for public use without compensation, that such a taking is not "due process of law." The truer historical view seems to be that the right to take and the moral duty to compensate are separate, and that failure to compensate does not invalidate the taking. But the position supported is consistent with the general attitude which the author assumes.

This attitude is the distinctive mark of the book. An ethical theory runs through the work, that the Fourteenth Amendment embodies a broad bill of rights; that the country is greatly menaced by improper legislation, and that its salvation is to be found in a broad construction of the Fourteenth Amendment. To this end the author gives to the word "liberty" its widest meaning, as equivalent to "freedom in the pursuit of happiness;" he wishes to include under the "privileges and immunities of citizens" all the rights mentioned in the first eight amendments; he regrets that the progressive income tax was not condemned as depriving citizens of the equal protection of the laws. This attitude is open to criticism, although the Supreme Court is showing a tendency to adopt it. Chief Justice Marshall's warning has a double-edged significance; we must remember it is a constitution with which we are dealing. While a constitution may well guarantee certain fundamental rights, such as that to personal freedom from restraint — which, indeed, is what "liberty" has always meant, unless this century has strangely broadened its significance — a constitution should not be expected to contain a solution of political problems, nor to act as a curb upon legislation *bonâ fide*, even though erratic. The danger of Mr. Guthrie's attitude is that it tends to shift the responsibility of government from the legislature to the courts, where it does not belong.

J. G. P.

THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS. By Charles Fisk Beach, Sr. St. Louis: Central Law Journal Co. 1898. pp. lxx, 760.

The greatness of the commercial interests involved and the novelty of many of the legal problems discussed make this treatise of peculiar importance. It is the principal topic alone, however, that gives the book character. The chapters dealing with the legal effect of contracts restraining trade and limiting the exercise of professions add little to common knowledge. pp. 107-224. Again, such chapters as those on trades unions, municipal contracts, and railway agreements are, at most, illustrative, and develop little new in principle. pp. 286-499. Nevertheless, the clearness of the exposition, and the fulness of the citations go far to justify these subsidiary portions of the work.

Interest centres in the discussion of the industrial "trust" — that vital problem of modern economics as of modern law. The "trust" has arisen, and has developed three defined forms within a decade. In the first class, the stock of the combining corporations is transferred to a board of trustees; in the second class, a central corporation acquires the stock of the absorbed companies; in the third class, a central corporation takes the property of the merged companies outright. The thesis of the author is that all are equally illegal by common law. But, the assumption that the whole doctrine against restraints of trade is elemental common law may well be questioned. p. 6. Nothing seems clearer in an examina-

tion of the old records than that the ancient law touching the subject was, in a most detailed manner, statutory. *The Lombard's Case*, Lib. Ass. pl. 38. Accordingly, we find modern English common law very cautious. *Mogul Steamship Co. v. McGregor*, [1892] App. Cas. 25. It must, however, be recognized that the author has the support of the American cases. These go far in giving relief without the aid of statute against "trusts" and "quasi-trusts" by common law actions, *quo warranto* proceedings, and injunctions. The question at common law is of less importance today from the number and severity of the late statutes. These exist for the United States and for two-thirds of the States. To note the letter of the law and to see the continued growth of "trusts," leads one to consider the question as yet political — not legal. So we find that attorneys-general usually do not move against the formation of "trust" corporations nor their legitimate business operations, but only against the "trust" that raises prices by stifling production and ruins competitors by differential rates. This policy of regarding these laws as regulative, not prohibitory, seems defensible, despite the indignation of the author.

B. W.

THE LAW RELATING TO BUILDING AND LOAN ASSOCIATIONS. By Wm. W. Thornton and Frank H. Blackledge. Albany, N. Y.: Matthew Bender. 1898. pp. lvi, 950.

The body of law which has grown up regarding building and loan associations cannot be readily treated as a separate branch of law. The plans and business methods of these organizations have differed widely; they have been commonly mismanaged; their existence has been spasmodic, and public favor has blown hot and cold concerning them since their beginning, a century ago. They have been variously incorporated and constantly surrounded and limited by special legislation. The result has been a conglomerate mass of petty litigation. The authors of this book have made no attempt to systematize that litigation, — rather they have pigeon-holed it. Each department or function of a building and loan society is taken up in turn, and the decisions limiting and defining it are briefly expounded. It can hardly be expected that such a volume will prove of aid to the organizer, the active worker in those societies. Its value must be as a book of reference to the lawyer who chances to be dealing with such subjects. From his point of view, the work is well done, the collection of cases careful and comprehensive, the annotation constant. As of particular merit may be pointed out the chapters on two distinctive features of building associations, fines and the right of withdrawal.

The second half of the volume, which figures modestly as "appendices," contains a collection of forms and tables showing the organization and management of a society: business methods, plans of book-keeping, a model set of by-laws, etc. These forms and suggestions might be of great value to the actual worker in such societies, but it is hard to see their connection with the text of the book, — the greater part of them are in no sense supplementary to it, and their insertion must be deemed an error in judgment.

J. P. C. Ja.

BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

BOUVIER'S LAW DICTIONARY. Vol. II. By John Bouvier. Revised by Francis Rawle. Boston: Boston Book Co. 1897.

EXPERIENCE IN THE SUPREME COURT OF THE UNITED STATES. By A. H. Garland. Washington, D. C.: John Byrne & Co. 1898.

MONOPOLIES AND INDUSTRIAL TRUSTS. By Charles Fisk Beach, Sr. St. Louis: Central Law Journal Co. 1898.

SELDON SOCIETY, — SELECT CASES IN THE COURT OF REQUESTS. Edited by I. S. Leadham. London: Bernard Quaritch. 1898.

STUDIES IN INTERNATIONAL LAW. By Thomas Erskine Holland. Oxford: Clarendon Press. 1898.

SUGGESTIONS TOWARD AN APPLIED SCIENCE OF SOCIOLOGY. By Edward Payson Payson. New York: G. P. Putnam's Sons. 1898.

THE NATIONAL BANKRUPTCY LAW. Address by Alexander New. Kansas City. 1898.

THE NEW PANAMA CANAL. By Gen. H. L. Abbot. New York: Forum Publishing Co. 1898.

THE NEW PANAMA CANAL COMPANY. Report. New York: Evening Post Job Printing House. 1898.

THE PRESENT STATUS OF THE PANAMA CANAL. By Gen. H. L. Abbot. New York: Evening Post Job Printing House. 1898.

THE UNITED STATES INTERNAL REVENUE LAWS. By Mark Ash and William Ash. New York: Baker, Voorhis & Co. 1899.

VIRGINIA BAR ASSOCIATION, — PRESIDENT'S ADDRESS. Richmond: Williams Printing Co. 1898.

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LAW IN SCIENCE AND SCIENCE IN LAW.¹

BY OLIVER WENDELL HOLMES.

THE law of fashion is a law of life. The crest of the wave of human interest is always moving, and it is enough to know that the depth was greatest in respect of a certain feature or style in literature or music or painting a hundred years ago to be sure that at that point it no longer is so profound. I should draw the conclusion that artists and poets, instead of troubling themselves about the eternal, had better be satisfied if they can stir the feelings of a generation, but that is not my theme. It is more to my point to mention that what I have said about art is true within the limits of the possible in matters of the intellect. What do we mean when we talk about explaining a thing? A hundred years ago men explained any part of the universe by showing its fitness for certain ends, and demonstrating what they conceived to be its final cause according to a providential scheme. In our less theological and more scientific day, we explain an object by tracing the order and process of its growth and development from a starting point assumed as given.

This process of historical explanation has been applied to the matter of our profession, especially of recent years, with great success, and with so much eagerness, and with such a feeling that when

¹ An Address delivered by Mr. Justice Holmes before the New York State Bar Association on January 17, 1899. — ED.

you had the true historic dogma you had the last word not only in the present but for the immediate future, that I have felt warranted heretofore in throwing out the caution that continuity with the past is only a necessity and not a duty. As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it, if it thinks it wise to do so, without the slightest regard to continuity with the past. That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think.

Historical explanation has two directions or aspects, one practical and the other abstractly scientific. I by no means share that morality which finds in a remoter practice the justification of philosophy and science. I do not believe that we must justify our pursuits by the motive of social well-being. If we have satisfied ourselves that our pursuits are good for society, or at least not bad for it, I think that science, like art, may be pursued for the pleasure of the pursuit and of its fruits, as an end in itself. I somewhat sympathize with the Cambridge mathematician's praise of his theorem, "The best of it all is that it can never by any possibility be made of the slightest use to anybody for anything." I think it one of the glories of man that he does not sow seed, and weave cloth, and produce all the other economic means simply to sustain and multiply other sowers and weavers that they in their turn may multiply, and so *ad infinitum*, but that on the contrary he devotes a certain part of his economic means to uneconomic ends — ends, too, which he finds in himself and not elsewhere. After the production of food and cloth has gone on a certain time, he stops producing and goes to the play, or he paints a picture, or asks unanswerable questions about the universe, and thus delightfully consumes a part of the world's food and clothing while he idles away the only hours that fully account for themselves.

Thinking in this way, you readily will understand that I do not consider the student of the history of legal doctrine bound to have a practical end in view. It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. The study pursued for such ends becomes science

in the strictest sense. Who could fail to be interested in the transition through the priest's test of truth,¹ the miracle of the ordeal, and the soldier's, the battle of the duel, to the democratic verdict of the jury! Perhaps I might add, in view of the great increase of jury-waived cases, a later transition yet — to the commercial and rational test of the judgment of a man trained to decide.

It is still only the minority who recognize how the change of emphasis which I have called the law of fashion has prevailed even in the realm of morals. The other day I was looking over Bradford's history — the book which Mr. Bayard brought as a gift from Lambeth to the Massachusetts State House — and I was struck to see recounted the execution of a man with horrible solemnities for an offence which still, to be sure, stands on the statute book as a serious crime, but which no longer is often heard of in court, which many would regard as best punished simply by the disgust of normal men, and which a few would think of only as a physiological aberration, of interest mainly to the pathologist. I found in the same volume the ministers consulted as the final expounders of the law, and learnedly demonstrating that what now we should consider as needing no other repression than a doctor's advice, was a crime punishable with death and to be ferreted out by searching the conscience of the accused, although after discussion it was thought that torture should be reserved for state occasions.

To take a less odious as well as less violent contrast, when we read in the old books that it is the duty of one exercising a common calling to do his work upon demand and do it with reasonable skill, we see that the gentleman is in the saddle, and means to have the common people kept up to the mark for his convenience. We recognize the imperative tone which in our day has changed sides, and is oftener to be heard from the hotel clerk than from the guest.

I spoke of the scientific study of the morphology and transformation of human ideas in the law, and perhaps the notion did not strike all of you as familiar. I am not aware that the study ever has been systematically pursued, but I have given some examples as I have come upon them in my work, and perhaps I may mention some now by way of illustration, which, so far as I know, have not been followed out by other writers. In the *Lex Salica*² — the law of the Salian Franks — you find going back to the fifth century a very mysterious person, later³ named the *salmannus* — the *saleman* — a

¹ I do not forget that the church abolished the ordeal.

² Merkel, c. 46.

³ A. D. 1108, Beseler, 263, n.

third person who was called in to aid in completing the transfer of property in certain cases. The donor handed to him a symbolic staff which he in due season handed over in solemn form to the donee. If we may trust M. Dareste, and take our information at second hand, a copious source of error, it would look as if a similar use of a third person was known to the Egyptians and other early peoples. But what is certain is that we see the same form used down to modern times in England for the transfer of copyhold. I dare say that many of you were puzzled, as I was when I was a law student, at the strange handing over of a staff to the lord or steward of the manor as a first step toward conveying copyhold land to somebody else. It really is nothing but a survival of the old form of the Salic law, as M. Vinogradoff at last has noticed, in his work on Villainage in England. There you have the Salic device in its original shape. But it is the transformations which it has undergone to which I wish to call your attention. The surrender to the steward is expressed to be to the use of the purchaser or donee. Now, although Mr. Kenelm Digby in his *History of the Law of Real Property* warns us that this has nothing to do with the doctrine of uses, I venture to think that, helped by the work of learned Germans as to the development of the saleman on the continent, I have shown heretofore that the saleman became in England the better known feoffee to uses, and thus that the connection between him and the steward of the manor when he receives the surrender of a copyhold is clear. But the executor originally was nothing but a feoffee to uses. The heir was the man who paid his ancestor's debts and took his property. The executor did not step into the heir's shoes, and come fully to represent the person of the testator as to personal property and liabilities until after Bracton wrote his great treatise on the laws of England. Surely a flower is not more unlike a leaf, or a segment of a skull more unlike a vertebra, than the executor as we know him is remote from his prototype, the saleman of the Salic law. I confess that such a development as that fills me with interest, not only for itself, but as an illustration of what you see all through the law — the paucity of original ideas in man, and the slow, coasting way in which he works along from rudimentary beginnings to the complex and artificial conceptions of civilized life. It is like the niggardly uninventiveness of nature in its other manifestations, with its few smells or colors or types, its short list of elements, working along in the same slow way from compound to compound until the dramatic impressiveness of the most intricate

compositions, which we call organic life, makes them seem different in kind from the elements out of which they are made, when set opposite to them in direct contrast.

In a book which I printed a good many years ago I tried to establish another example of the development and transformation of ideas. The early law embodied hatred for any immediate source of hurt, which comes from the association of ideas and imperfect analysis, in the form of proceedings against animals and inanimate objects, and of the *noxæ deditio* by which the owner of the offending thing surrendered it and was free from any further liability. I tried to show that from this primitive source came, in part at least, our modern responsibility of an owner for his animals and of a master for his servants acting within the scope of their employment, the limited liability of shipowners under the law which allows them to surrender their vessel and free themselves, and that curious law of deodand, under which a steam engine was declared forfeited by the Court of Exchequer in 1842.¹ I shall have to suggest later that it played a part also in the development of contract.

Examples like these lead us beyond the transformations of an idea to the broader field of the development of our more general legal conceptions. We have evolution in this sphere of conscious thought and action no less than in lower organic stages, but an evolution which must be studied in its own field. I venture to think that the study is not yet finished. Take for instance the origin of contract. A single view has prevailed with slight modifications since Sohm published "*Das Recht der Eheschliessung*" in 1875. But fashion is potent in science as well as elsewhere, and it does not follow because Sohm smashed his predecessor that there may not arise a later champion who will make some impact upon him. Sohm, following a thought first suggested, I believe, by Savigny, and made familiar by Maine in his "*Ancient Law*," sees the beginning of contract in an interrupted sale. This is expressed in later law by our common law Debt, founded upon a *quid pro quo* received by the debtor to the creditor. Out of this, by a process differently conceived by different writers, arises the formal contract, the *fides facta* of the Salic law, the covenant familiar to us. And this dichotomy exhausts the matter. I do not say that this may not be proved to be the final and correct

¹ *Regina v. Eastern Counties Railway Co.*, 10 M. & W. 59.

account, but there are some considerations which I should like to suggest in a summary way. We are not bound to assume with Sohm that his Frankish ancestors had a theory in their heads which, even if a trifle inarticulate, was the majestic peer of all that was done at Rome. The result of that assumption is to lead to the further one, tacitly made, but felt to be there, that there must have been some theory of contract from the beginning, if only you can find what it was. It seems to me well to remember that men begin with no theory at all, and with no such generalization as contract. They begin with particular cases, and even when they have generalized they are often a long way from the final generalizations of a later time. Down into this century consideration was described by enumeration, as you may see in Tidd's "Practice," or Blackstone,¹ and only of late years has it been reduced to the universal expression of detriment to the promisee. So, bailment was Bailment and nothing further until modern times. It was not contract. And so warranty was Warranty, a duty imposed by law upon the vendor, and nothing more.² A trust still is only a Trust, although according to the orthodox it creates merely a personal obligation.

Well, I have called attention elsewhere to the fact that giving hostages may be followed back to the beginning of our legal history, as far back as sales, that is, and that out of the hostage grew the surety, quite independently of the development of debt or formal contract. If the obligation of the surety, who, by a paradox explained by his origin, appears often in early law without a principal contractor, as the only party bound, had furnished the analogy for other undertakings, we never should have had the doctrine of consideration. If other undertakings were to be governed by the analogy of the law developed out of sales, sureties must either have received a *quid pro quo* or have made a covenant. There was a clash between the competing ideas, and just as commerce was prevailing over war the children of the sale drove the child of the hostage from the field. In the time of Edward III. it was decided that a surety was not bound without a covenant, except in certain cities where local custom maintained the ancient law. Warranty of land came to require, and thus to be, a covenant in the same way, although the warranty of title upon a sale of chattels still

¹ 1 Tidd, ch. 1; 2 Bl. Comm. 444, 445.

² Glanv. x, ch. 15; Bracton, 151; 1 Löning, Vertragsbruch, § 14, p. 103; cf. Sohm, Inst. Rom. Law, § 46, § 11, n. 7.

retains its old characteristics, except that it now is thought of as a contract.¹

But the hostage was not the only competitor for domination. The oath also goes back as far as the history of our race.² It started from a different point, and, leaving the possible difference of sanction on one side, it might have been made to cover the whole field of promises. The breach of their promissory oath by witnesses still is punished as perjury, and formerly there were severe penalties for the jury if convicted of a similar offence by attain.³ The solemnity was used for many other purposes, and, if the church had had its way, the oath, helped by its cousin the plighting of troth, would have been very likely to succeed. In the time of Henry III., faith, oath, and writing, that is, the covenant, were the popular familiar forms of promise. The plighting of a man's faith or troth, still known to us in the marriage ceremony, was in common use, and the courts of the church claimed jurisdiction over it as well as over the oath. I have called attention elsewhere to a hint of inclination on the part of the early clerical chancellors to continue the clerical jurisdiction in another court, and to enforce the ancient form of obligation. Professor Ames has controverted my suggestion, but I cannot but think it of significance that down to later times we still find the ecclesiastical tribunals punishing breach of faith or of promissory oaths with spiritual penalties. When we know that a certain form of undertaking was in general use, and that it was enforced by the clergy in their own courts, a very little evidence is enough to make us believe that in a new court, also presided over by a clergyman and with no substantive law of its own, the idea of enforcing it well might have been entertained, especially in view of the restrictions which the civil power put upon the church. But oath and plighting of troth did not survive in the secular forum except as an occasional solemnity, and I have mentioned them only to show a lively example of the struggle for life among competing ideas, and of the ultimate victory and survival of the strongest. After victory the law of covenant and debt went on, and consolidated and developed their empire in a way that is familiar to you all, until they in their turn lost something of their power and prestige in consequence of the rise of a new rival, *Assumpsit*.

¹ Y. B., 13 & 14 Ed. III. 80.

² Cæsar, B. G., iv, 11; Ammianus Marcellinus, xvii, 1, 13, *jurantes conceptis ritu patrio verbis*.

³ Bracton, 292 b.

There were other seeds which dropped by the wayside in early law, and which were germs of relations that now might be termed contractual, such as the blood covenant, by which people bound themselves together or made themselves of one substance by drinking the blood or eating the flesh of a newly killed animal. Such was the fiction of family relationship, by which, for instance, the Aedui symbolized their alliance with the Romans.¹ I may notice in this connection that I suspect that the *mundium* or early German guardianship was the origin of our modern bail, while, as I have said, the surety came from a different source. I mention these only to bring still closer home the struggle for existence between competing ideas and forms to which I have referred. In some instances the vanquished competitor has perished. In some it has put on the livery of its conqueror, and has become in form and external appearance merely a case of covenant or assumpsit.

Another important matter is the way in which the various obligations were made binding after they were recognized. A breach of oath of course brought with it the displeasure of the gods. In other cases, as might be expected, we find hints that liabilities of a more primitive sort were extended to the new candidates for legal recognition. In the Roman law a failure to pay the price of a purchase seems to have suggested the analogy of theft. All over the world slavery for debt is found, and this seems not to have stood on the purely practical considerations which first would occur to us, but upon a notion akin to the noxal surrender of the offending body for a tort. There is a mass of evidence that various early contracts in the systems of law from which our own is descended carried with them the notion of pledging the person of the contracting party, — a notion which we see in its extreme form in the seizure or division of the dead body of the debtor,² and which seems to come out in the maxim *Debita inhaerent ossibus debitoris*.

I am not going to trace the development of every branch of our law in succession, but if we turn to the law of torts we find there, perhaps even more noticeably than in the law of contracts, another evolutionary process which Mr. Herbert Spencer has made familiar to us by the name of Integration. The first stage of torts embraces little if anything beyond those simple acts of violence

¹ Strabo, iv, 32.

² See, e. g., Three Metrical Romances, Camden Soc. 1842, introd. page xxvi and cantos xii & xxii; Boccaccio, Bohn's tr. page 444 n., referring to an old English ballad

where the appeals of death, of wounding or maiming, of arson and the like had taken the place of self-help, to be succeeded by the modification known as the action of trespass. But when the action on the case let libel and slander and all the other wrongs which are known to the modern law into the civil courts, for centuries each of the recognized torts had its special history, its own precedents, and no one dreamed, so far as I know, that the different cases of liability were, or ought to be, governed by the same principles throughout. As is said in the preface to Mr. Jaggard's book, "the use of a book on Torts, as a distinct subject, was a few years ago a matter of ridicule." You may see the change which has taken place by comparing Hilliard on Torts, which proceeds by enumeration in successive chapters through assault and battery, libel and slander, nuisance, trespass, conversion, etc., with Sir Frederick Pollock's Introduction, in which he says that the purpose of his book "is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts — that this is a true living branch of the Common Law, not a collection of heterogeneous instances." It would be bold, perhaps, to say that the integration was complete, that it did not rest partly in tendency. The recent much discussed case of *Allen v. Flood*, in the House of Lords, seems to me to indicate that, in the view of the older generation even of able and learned men, the foundation of liability still is somewhat in the air, and that tradition and enumeration are the best guides to this day. But I have no doubt that the generalizing principle will prevail, as generalization so often prevails, even in advance of evidence, because of the ease of mind and comfort which it brings.

Any one who thinks about the world as I do does not need proof that the scientific study of any part of it has an interest which is the same in kind as that of any other part. If the examples which I have given fail to make the interest plain, there is no use in my adding to them, and so I shall pass to another part of my subject. But first let me add a word. The man of science in the law is not merely a bookworm. To a microscopic eye for detail he must unite an insight which tells him what details are significant. Not every maker of exact investigation counts, but only he who directs his investigation to a crucial point. But I doubt if there is any more exalted form of life than that of a great abstract thinker, wrapt in the successful study of problems to which he devotes himself, for an end which is neither unselfish nor selfish in the com-

mon sense of those words, but is simply to feed the deepest hunger and to use the greatest gifts of his soul.

But after all the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace. But to make up your mind at your peril upon a living question, for purposes of action, calls upon your whole nature. I trust that I have shown that I appreciate what I thus far have spoken of as if it were the only form of the scientific study of law, but of course I think, as other people do, that the main ends of the subject are practical, and from a practical point of view, history with which I have been dealing thus far, is only a means, and one of the least of the means, of mastering a tool. From a practical point of view, as I have illustrated upon another occasion, its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations. Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals. Many might as well be different, and history is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old. Notwithstanding the contrasts which I have been making, the practical study of the law ought also to be scientific. The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition. It is this latter part to which I now am turning, and I begin with one or two instances of the help of history in clearing away rubbish,—instances of detail from my own experience.

Last autumn our court had to consider the grounds upon which evidence of fresh complaint by a ravished woman is admitted as part of the government's case in an indictment for rape. All agree that it is an exception to the ordinary rules of evidence to allow a witness to be corroborated by proof that he has said the same thing elsewhere when not under oath, except possibly by way of rebuttal under extraordinary circumstances. But there is the exception, almost as well settled as the rule, and courts and lawyers finding the law to be established proceed to account for it by consulting their wits. We are told that the outrage is so great that there is a natural presumption that a virtuous woman would disclose it at the first suitable opportunity. I confess that I should think this was about the last crime in which such a presumption could be made, and that it was far more likely that a man who had had his pocket picked or who had been the victim of an attempt to murder would speak of it, than that a sensitive woman would disclose such a horror. If we look into history no further than Hale's "Pleas of the Crown," where we first find the doctrine, we get the real reason and the simple truth. In an appeal of rape the first step was for the woman to raise hue and cry. Lord Hale, after stating that fact, goes on to say that upon an indictment for the same offence the woman can testify, and that her testimony will be corroborated if she made fresh complaint and pursued the offender. That is the hue and cry over again. At that time there were few rules of evidence. Later our laws of evidence were systematized and developed. But the authority of Lord Hale has caused his dictum to survive as law in the particular case, while the principle upon which it would have to be justified has been destroyed. The exception in other words is a pure survival, having nothing or very little to back it except that the practice is established.¹

In a somewhat earlier case² I tried to show that the doctrine of trespass *ab initio* in like manner was the survival in a particular class of cases of a primitive rule of evidence, which established intent by a presumption of law from subsequent conduct, after the rule had gone to pieces and had been forgotten as a whole. Since that decision Professor Ames has made some suggestions which may or may not modify or enlarge the view which I took, but

¹ Commonwealth v. Cleary, 172 Mass. 172.

² Commonwealth v. Rubin, 165 Mass. 453.

which equally leave the doctrine a survival, the reasons for which long have disappeared.

In *Brower v. Fisher*,¹ the defendant, a deaf and dumb person, had conveyed to the plaintiff real and personal property, and had got a judgment against the plaintiff for the price. The plaintiff brought a bill to find out whether the conveyance was legal, and got an injunction *pendente lite* to stay execution on the judgment. On the plaintiff's petition a commission of lunacy was issued to inquire whether the defendant was *compos mentis*. It was found that he was so unless the fact that he was born deaf and dumb made him otherwise. Thereupon Chancellor Kent dismissed the bill but held the inquiry so reasonable that he imposed no costs. The old books of England fully justified his view; and why? History again gives us the true reason. The Roman law held very properly that the dumb, and by extension the deaf, could not make the contract called *stipulatio* because the essence of that contract was a formal question and answer which the dumb could not utter and the deaf could not hear. Bracton copies the Roman law and repeats the true reason, that they could not express assent, *consentire*; but shows that he had missed the meaning of *stipulari* by suggesting that perhaps it might be done by gestures or writing. Fleta copied Bracton, but seemed to think that the trouble was inability to bring the consenting mind, and whereas the Roman law explained that the rule did not apply to one who was only hard of hearing—*qui tardius exaudit*—Fleta seems to have supposed that this pointed to a difference between a man born deaf and dumb and one who became so later in life.² In Perkins's "Profitable Book," this is improved upon by requiring that the man should be born blind, deaf, and dumb, and then the reason is developed that "a man that is born blind, deaf, and dumb can have no understanding, so that he cannot make a gift or a grant."³ In a case before Vice-Chancellor Wood⁴ good sense prevailed, and it was laid down that there is no exception to the presumption of sanity in the case of a deaf and dumb person.

Other cases of what I have called inflated and unreal explanations, which collapse at the touch of history, are the liability of a master for the torts of his servant in the course of his employment, to which I have referred earlier, and which thus far never, in my

¹ 4 Johns. Ch. 441.

² Pl. 25; Co. Lit. 42*b*.

³ But see C. 6, 22, 10.

⁴ *Harrod v. Harrod*, 1 K. & J. 4, 9.

opinion, has been put upon a rational footing; and the liability of a common carrier, which, as I conceive, is another distorted survival from the absolute responsibility of bailees in early law, crossed with the liability of those exercising a common calling to which I have referred. These examples are sufficient, I hope, to illustrate my meaning, and to point out the danger of inventing reasons offhand for whatever we find established in the law. They lead me to some other general considerations in which history plays no part, or a minor part, but in which my object is to show the true process of law-making, and the real meaning of a decision upon a doubtful case and thus, as in what I have said before, to help in substituting a scientific foundation for empty words.

I pass from unreal explanations to unreal formulas and inadequate generalizations, and I will take up one or two with especial reference to the problems with which we have to deal at the present time. The first illustration which occurs to me, especially in view of what I have been saying, is suggested by another example of the power of fashion. I am immensely struck with the blind imitateness of man when I see how a doctrine, a discrimination, even a phrase, will run in a year or two over the whole English-speaking world. Lately have we not all been bored to death with *volenti non fit injuria*, and with Lord Justice Bowen's remark that it is *volenti* and not *scienti*? I congratulate any State in whose reports you do not see the maxim and its qualification repeated. I blush to say that I have been as guilty as the rest. Do we not hear every day of taking the risk—an expression which we never heard used as it now is until within a very few years? Do we not hear constantly of invitation and trap—which came into vogue within the memory of many, if not most of those who are here? Heaven forbid that I should find fault with an expression because it is new, or with the last mentioned expressions on any ground! Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties. Every living sentence which shows a mind at work for itself is to be welcomed. It is not the first use but the tiresome repetition of inadequate catch words upon which I am observing,—phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years. That comes from the same source as dislike of novelty,—intellectual indolence or weakness,—a slackening in the eternal pursuit of the more exact.

The growth of education is an increase in the knowledge of measure. To use words familiar to logic and to science, it is a substitution of quantitative for qualitative judgments. The difference between the criticism of a work of art by a man of perception without technical training and that by a critic of the studio will illustrate what I mean. The first, on seeing a statue, will say, "It is grotesque," a judgment of quality merely; the second will say, "That statue is so many heads high, instead of the normal so many heads." His judgment is one of quantity. On hearing a passage of Beethoven's Ninth Symphony the first will say, "What a gorgeous sudden outburst of sunshine!" — the second, "Yes, great idea to bring in his major third just there, wasn't it?" Well, in the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed. The worth, that is, the intensity of the competing desires, varies with the varying ideals of the time, and, if the desires were constant, we could not get beyond a relative decision that one was greater and one was less. But it is of the essence of improvement that we should be as accurate as we can. Now to recur to such expressions as taking the risk and *volenti non fit injuria*, which are very well for once in the sprightly mouth which first applies them, the objection to the repetition of them as accepted legal formulas is that they do not represent a final analysis, but dodge difficulty and responsibility with a rhetorical phrase. When we say that a workman takes a certain risk as incident to his employment, we mean that on some general grounds of policy blindly felt or articulately present to our mind, we read into his contract a term of which he never thought; and the real question in every case is, What are the grounds, and how far do they extend? The question put in that form becomes at once and plainly a question for scientific determination, that is, for quantitative comparison by means of whatever measure we command. When we speak of taking the risk apart from contract, I believe that we merely are expressing what the law means by negligence, when for some reason or other we wish to express it in a conciliatory form.

In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults.

In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations. In some regions of conduct of a special sort we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury. From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact. I have heard it urged with great vehemence by counsel, and calmly maintained by professors that, in addition to their wrongs to labor, courts were encroaching upon the province of the jury when they directed a verdict in a negligence case, even in the unobtrusive form of a ruling that there was no evidence of neglect.

I venture to think, on the other hand, now, as I thought twenty years ago, before I went upon the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street. If a man fires a gun over a prairie that looks empty to the horizon, or crosses a railroad which he can see is clear for a thousand yards each way, he is not negligent, that is, he is free from legal liability in the first case, he has not prevented his recovery by his own conduct, if he is run over, in the second, as matter of law. If he fires a gun into a crowded street, or tries to cross

a track ten feet in front of an express train in full sight running sixty miles an hour, he is liable, or he cannot recover, again as matter of law, supposing these to be all the facts in the case. What new question of fact is introduced if the place of firing is something half way between a prairie and a crowded street, or if the express train is two hundred, one hundred, or fifty yards away? I do not wish to repeat arguments which I published long ago, and which have been more or less quoted in leading text-books. I only wish to insist that false reasons and false analogies shall not be relied upon for daily practice. It is so easy to accept the phrase "there is no evidence of negligence," and thence to infer, as the English House of Lords has inferred, as Professor Thayer infers in his admirable Preliminary Treatise on Evidence which has appeared since these words were written, that the question is the same in kind as any other question whether there is evidence of a fact.

When we rule on evidence of negligence we are ruling on a standard of conduct, a standard which we hold the parties bound to know beforehand, and which in theory is always the same upon the same facts and not a matter dependent upon the whim of the particular jury or the eloquence of the particular advocate. And I may be permitted to observe that, referring once more to history, similar questions originally were, and to some extent still are, dealt with as questions of law. It was and is so on the question of probable cause in malicious prosecution.¹ It was so on the question of necessities for an infant.² It was so in questions of what is reasonable,³ as — a reasonable fine,⁴ convenient time,⁵ seasonable time,⁶ reasonable time,⁷ reasonable notice of dishonor.⁸ It is so in regard to the remoteness of damage in an action of contract.⁹ Originally in malicious prosecution, probable cause, instead of being negatived in the declaration, was pleaded by the defendant, and the court passed upon the sufficiency of the cause alleged. In the famous case of *Weaver v.*

¹ *Knight v. Jermin*, Cro. Eliz. 134; s. c. *nom.* *Knight v. German*, Cro. Eliz. 70; *Paine v. Rochester*, Cro. Eliz. 871; *Chambers v. Taylor*, Cro. Eliz. 900.

² *Mackarell v. Bachelor*, Cro. Eliz. 583. As to married women see *Manby v. Scott*, 1 Siderfin, 109, 2 Sm. L. C.

³ *Caterall v. Marshall*, 1 Mod. 70.

⁴ *Hobart v. Hammond*, 4 Co. Rep. 27 b.

⁵ *Stodder v. Harvey*, Cro. Jac. 204.

⁶ *Bell v. Wardell*, Willes, 202, A. D. 1740.

⁷ *Butler v. Play*, 1 Mod. 27.

⁸ *Tindal v. Brown*, 1 T. R. 167, A. D. 1786. In this case an exact line has been worked out for commercial paper, and an arbitrary rule established.

⁹ *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122; *Hammond & Co. v. Bussey*, 20 Q. B. D. 79, 89; *Johnson v. Faxon*, Mass. Jan. 9, 1899.

Ward,¹ the same course was suggested as proper for negligence. I quote: "as if the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." But about the middle of the last century, when the rule of conduct was complicated with practical details the court began to leave some of these questions to the jury. Nevertheless, Mr. Starkie, a man of intellect, who was not imposed upon by phrases, very nearly saw the ground upon which it was done, and puts it on the purely practical distinction that when the circumstances are too special and complicated for a general rule to be laid down the jury may be called in. But it is obvious that a standard of conduct does not cease to be a law because the facts to which that standard applies are not likely often to be repeated.

I do not believe that the jury have any historic or *a priori* right to decide any standard of conduct. I think that the logic of the contrary view would be that every decision upon such a question by the court is an invasion of their province, and that all the law properly is in their breasts. I refer to the subject, however, merely as another matter in which phrases have taken the place of real reasons, and to do my part toward asserting a certain freedom of approach in dealing with negligence cases, not because I wish to quarrel with the existing and settled practice. I think that practice may be a good one, as it certainly is convenient, for Mr. Starkie's reason. There are many cases where no one could lay down a standard of conduct intelligently without hearing evidence upon that, as well as concerning what the conduct was. And although it does not follow that such evidence is for the jury, any more than the question of fact whether a legislature passed a certain statute, still they are a convenient tribunal, and if the evidence to establish a rule of law is to be left to them, it seems natural to leave the conclusion from the evidence to them as well. I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into things or form a saner judgment than a sensible and well trained judge. I have not found them freer from prejudice than an ordinary judge would be. Indeed one reason why I believe in our practice of leaving questions of negligence to them is what is precisely

¹ Hobart, 134.

one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community. Possibly such a justification is a little like that which an eminent English barrister gave me many years ago for the distinction between barristers and solicitors. It was in substance that if law was to be practised somebody had to be damned, and he preferred that it should be somebody else.

My object is not so much to point out what seems to me to be fallacies in particular cases as to enforce by various examples and in various applications the need of scrutinizing the reasons for the rules which we follow, and of not being contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the union to the other. We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true. I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds. I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. Indeed precisely because I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle, I am slow to consent to overruling a precedent, and think that our most important duty is to see that the judicial duel shall be fought out in the accustomed way. But I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way.

The social question is which desire is strongest at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice.

I have given an example of what seems to me the uninstrusive and indolent use of phrases to save the trouble of thinking closely, in the expression "taking the risk," and of what I think a misleading use in calling every question left to the jury a question of fact. Let me give one of over-generalization, or rather of the danger of reasoning from generalizations unless you have the particulars which they embrace in mind. A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer. Hence the futility of arguments on economic questions by any one whose memory is not stored with economic facts. *Allen v. Flood* was decided lately by the English House of Lords upon a case of maliciously inducing workmen to leave the plaintiff's employ. It is made harder to say what the precise issue before the House was, by the fact that except in fragmentary quotations it does not appear what the jury were told would amount to a malicious interference. I infer that they were instructed as in *Temperton v. Russell*,¹ in such a way that their finding meant little more than that the defendant had acted with knowledge and understanding of the harm which he would inflict if successful. Or if I should add an intent to harm the plaintiff without reference to any immediate advantage to the defendant, still I do not understand that finding meant that the defendant's act was done from disinterestedly malevolent motives, and not from a wish to better the defendant's union in a battle of the market. Taking the point decided to be what I suppose it to be, this case confirms opinions which I have had occasion to express judicially, and commands my hearty assent. But in the elaborate, although to my notion inadequate, discussion which took place, eminent judges intimated that anything which a man has a right to do he has a right to do whatever his motives, and this has been hailed as a triumph of the principle of external

¹ [1893] 1 Q. B. 715.

standards in the law, a principle which I have done my best to advocate as well as to name. Now here the reasoning starts from the vague generalization Right, and one asks himself at once whether it is definite enough to stand the strain. If the scope of the right is already determined as absolute and irrespective of motive, *cadit quæstio*, there is nothing to argue about. So if all rights have that scope. But if different rights are of different extent, if they stand on different grounds of policy and have different histories, it does not follow that because one right is absolute another is,—and if you simply say all rights shall be so, that is only a pontifical or imperial way of forbidding discussion. The right to sell property is about as absolute as any I can think of, although, under statutes at least, even that may be affected by motive, as in the case of an intent to prefer creditors. But the privilege of a master to state his servant's character to one who is thinking of employing him is also a right within its limits. Is it equally extensive? I suppose it would extend to mistaken statements volunteered in good faith out of love for the possible employer. Would it extend to such statements volunteered simply out of hate for the man? To my mind here, again, generalities are worse than useless, and the only way to solve the problem presented is to weigh the reasons for the particular right claimed and those for the competing right to be free from slander as well as one can, and to decide which set preponderates. Any solution in general terms seems to me to mark a want of analytic power.

Gentlemen, I have tried to show by examples something of the interest of science as applied to the law, and to point out some possible improvement in our way of approaching practical questions in the same sphere. To the latter attempt, no doubt, many will hardly be ready to yield me their assent. But in that field, as in the other, I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy. Very likely it may be that with all the help that statistics and every modern appliance can bring us there never will be a commonwealth in which science is everywhere supreme. But it is an ideal, and without ideals what is life worth? They furnish us our perspectives and open glimpses of

the infinite. It often is a merit of an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection. At the least it glorifies dull details, and uplifts and sustains weary years of toil with George Herbert's often quoted but ever inspiring verse :

“ Who sweeps a room as in Thy cause,
Makes that and the action fine.”

OUR NEW POSSESSIONS.¹

ON the part of many who are dealing with the important questions now agitating the country there is to be observed, in the newspapers and elsewhere, a great deal of two things, which may be called, in homely phrase, crying over spilled milk, and jumping before you reach the stile; a great deal also of bad constitutional law, bad political theory, and ill-understood history.

When we elect persons to office they have the power of committing us to courses of conduct and to policies which may be very unacceptable to us. Perhaps war may be made, when we personally abhor it; perhaps peace may be made on terms very repugnant to us; perhaps the whole traditional policy of the country may be reversed, contrary to our wishes; schemes may be forwarded which we have always opposed as fraught with the utmost danger. Whether we like it or not, the accomplishment of such results is often fully in the power of our public servants. It is we ourselves that have given them the power; they hold our commission, and we are bound by their acts. When such results have actually been accomplished, what are we to do? We may abandon the country and go elsewhere. We may sit down and cry over the calamity. We may quarrel with the facts, and refuse to recognize them. I think it is better to face them, however unwelcome, and seek to shape the future as best we may.

Let me make a preliminary application of these remarks, so as to leave entirely clear my own point of view on one subject, and to get it behind us, in this discussion. Doubtless this Spanish war has brought about a great benefit to mankind, by ending the misrule of Spain in her American colonies, and almost ending it in her Asiatic ones. That these regions will themselves be much better off under any probable government that now awaits them,

¹ This paper was prepared for a non-professional audience, to which it was read on January 9 last. The writer has hesitated about submitting to the learned readers of this REVIEW a paper somewhat too slight, perhaps, for their consideration, and in danger, moreover, of becoming antiquated before it can be published. In assenting to this use of it he is influenced by the important nature of some of the suggestions here made,—as they appear to him,—and by the fact that he cannot undertake to remodel it.

we must all believe. Doubtless also noble exhibitions of courage and skill have illustrated the war. Always, thank God, the human creature of our blood, in such emergencies, can be counted on for these things. Doubtless also it was the distinction of our own nation to bring about these great results. But let us not too quickly exult in that. It does not at all follow that we have anything to be proud of. It may still be true that our real place in this business is a discreditable one. Personally I think it is.

"God moves in a mysterious way
His wonders to perform."

He makes the wrath of man to praise him. Not seldom great and beneficent ends come about through the folly, the moral weakness, the thoughtlessness, the wickedness of nations, — through their lack of noble qualities, as well as through the conscious exercise of virtue and self-restraint. I think that history will find this to be true in the case of the late war; for, to say no worse of it, it was a war, with all its awful concomitants, which we, a strong nation, forced upon a feeble one while it was on its knees, ready to surrender everything of substance, if only it might save its pride.

But the events of last year, of this hell of war, "as in the best it is," have slipped by into the vast cavern of the past, and it is useless to lament them. There they stand, fixed forever and unchangeable.

"Not the gods can shake the past.
Flies to the adamant door,
Bolted down for evermore.
None can re-enter there. . . .
To bind or unbind, add what lacked, . . .
Alter or mend eternal fact."

It is not the war, then, that is to be the subject for our reflections to-night, whatever we may think of it, but the portentous consequences of the war; these great and unwelcome questions about the treaty and the island dependencies.

In speaking of these questions, we must again recognize accomplished facts. No longer can we claim our old good fortune of being able to work out a great destiny by ourselves, here in this western world. In my judgment it was a bad mistake to throw away our wonderful inherited felicity, in being removed from endless complications with the politics of other continents. Had we appreciated our great opportunity and been worthy of it, we might

have worked out here that separate, peculiar, high destiny which our ancestors seemed to foresee for us, and which with all its grave drawbacks and moral dangers, might have done more for mankind than anything we may hope to accomplish now by taking a leading part in the politics of the world. "Let not England," said John Milton to the Parliament in 1645, "forget her precedence of teaching nations how to live." So to the United States of America, before this Spanish war,—possessed as she was of this fortunate isolation, of free yet guarded institutions, of vast, unpeopled areas, of an opportunity to illustrate how nations may be governed without wars and without waste, and how the great mass of men's earnings may be applied, not to the machinery of government, or the rewarding of office-holders, or the wasteful activities and enginery of war, but to the comforts and charities of life and to all the nobler ends of human existence,—so, I say, to our country as she was before the war, that same solemn warning of Milton, "God-gifted organ-voice of England," might well have come: "Let not America forget her precedence of teaching nations how to live."

But now we are no longer where we were. The war has broken down the old barriers. First it bought us Hawaii, a colony two thousand miles away, in the Pacific Ocean. In point of distance this was much as if we should sail out over the Atlantic and annex the Azores. And now the end of the war is bringing us Puerto Rico, Cuba, and the Philippine Islands. All these strange tropical countries are likely to be on our hands. Hawaii is already actually a part of our territory. From the other islands we have driven out their sovereign, and we have loaded ourselves with great responsibilities and hazards in supplying them with government, maintaining order, and determining what shall be their fate in the future. What are we to do? That the situation is full of peril for us there is no doubt; that it is certain to involve us in great outlays and perplexities, and in constant hazard of war is clear enough.

I have spoken of accomplished facts. Let us take account of these a little more accurately. First, technically speaking, the war is not yet over. But as practical men we may as well be assured that it will not be renewed. Let us accept that, with all its consequences, as an accomplished fact, and let us no longer cry over the war. Second, the negotiation of the treaty of peace is another accomplished fact. We might have preferred something

very different. But the President whom we have charged with responsibility has seen fit to put it in the shape which has been unofficially disclosed in our newspapers. The negotiation of the treaty; I do not say that the treaty itself is an accomplished fact. That is now pending in the Senate. Perhaps it may be amended in some respects. For one, I am disposed to believe that it should be. But I think we shall find that it will soon be ratified, substantially in its present shape. Let us, then, assume that we are to have the governing of Cuba for a considerable time, if not forever, and that we are to possess Puerto Rico and more or less of the Philippine archipelago, with the duty of furnishing a government to them. Third, the full annexation of Hawaii is an accomplished fact; that, like the other islands, has come to us as a consequence of this war.

Now observe, what is often forgotten, that we have actually turned a corner. We are no longer considering the expediency of entering upon a foreign colonial policy; we have already begun upon it. All the elements of the problem of governing distant tropical dependencies are found in the case of Hawaii; and Hawaii was definitely made a territory on July 7th, 1898. All the rest of our possessions involve merely a question of more or less. And the questions that confront us are simply these: Having these islands on our hands, (1) What can we do with them? (2) What should we do with them? In other words, (1) What constitutional power have we in the matter; and (2) What is our true policy?

I. In the first place, as to our constitutional power, that is a question of constitutional law. Let me at once and shortly say that, in my judgment, there is no lack of power in our nation, — of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them; that we have the same power that other nations have; and that we may, subject to the agreements of the treaty, sell them, if we wish, or abandon them, or set up native governments in them, with or without a protectorate, or govern them ourselves. I take it for granted that we shall not sell them or abandon them; that we shall hold them and govern them, or provide governments for them.

In considering this matter of constitutional power, it is necessary, in view of what we are reading in the newspapers nowadays, to discriminate a little. Our papers and magazines and even the discourses of distinguished public men, are sometimes a little con-

fused. We must disentangle views of political theory, political morals, constitutional policy, and doctrines as to that convenient refuge for loose thinking which is vaguely called the "spirit" of the Constitution, from doctrines of constitutional law. Very often this is not carefully and consistently done. And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution,—of what people have been imagining and putting forward as the Constitution. That it was unconstitutional to buy Louisiana and Florida; that it was unconstitutional to add new states to the Union from territory not belonging originally to it; that it was unconstitutional to govern the territories at all; that it was unconstitutional to charter a bank, to issue paper money, to make it a legal tender, to enact a protective tariff,—that these and a hundred other things were a violation of the Constitution, has been solemnly and passionately asserted by statesmen and lawyers. Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistance of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its spirit, and sought thus, when the question was one of mere power, to restrict its great liberty. That instrument, astonishingly well adapted for the purposes of a great, developing nation, shows its wisdom mainly in the shortness and generality of its provisions, in its silence, and its abstinence from petty limitations. As it survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they are finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Constitution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitu-

tion are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought. It is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness. In the entire list of the judges of our highest court, past and present, in the business of interpreting the Constitution, few indeed are the men who have not, now and again, signally failed to appreciate the large scope of this great charter of our national life. Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country.

As regards the Constitution, let me say one or two things more. A great deal is said, and rightly said, as to the limitations in the grants of power to the general government. Doubtless this Constitution is essentially different from those of the States, in that the provisions of the latter affect a government which has all power, except so far as the State has parted with any of it to the United States, or as it is withheld by the State constitution itself. On the other hand, the United States did not begin with any such reservoir of power; it had and has only what is granted in the Federal Constitution for the general purposes. But these granted powers, while limited in number, are supreme, full, and absolute in their reach, subject only to any specific abatements made in the Constitution itself. The situation brought about by the remarkable transaction of a century ago, when our States combined to create the United States, may be truly conceived of as the setting up of a single great power, which, for certain general ends should be, to each one of the States, its other half. In each State, if you look about for the total contents of sovereign power, you find a part of it, the local part, in the State, and the rest of it in the general government. Each holds the same relation to this common government; each has contributed to it the same proportion of its total stock; so that at the end of your search you find, as regards certain of the chief governmental functions — for example the war power and the power of dealing with foreign nations — that there is but one government in the country, and that, so far as these particular functions are concerned, it is as sovereign as each State was before it parted with its powers; just as sovereign as regards these immense and far-reaching functions and for all the purposes that they involve, as any one of the great nations of the world. If you ask what this nation may do in prosecuting the ends for which it was created, the answer is, It may do what other sovereign nations may do. In creating this

new nation, it was not intended by the States, except as they have said so in the Constitution, to diminish the scope of the great powers they parted with. Their aim was merely to secure greater efficiency by putting the power in stronger hands, hands that could strike with the undiminished strength of all. No part of sovereignty vanished in this process of transferring it. Of course, the general government was submitted to some restraints in the national Constitution, and whatever these are, they are an abatement from the fulness of absolute power in the particulars to which they relate. But, speaking generally, it is true that while one, two, six, or eight specific powers only are given to the general government, yet as regards these it is the fulness of power that is given. So far as the general welfare and the other great ends mentioned in the preamble to the Constitution can be secured by intercourse with foreign nations, peaceful or warlike, by the post-office, or by the regulation of interstate commerce, these matters are intrusted to the general government in their fulness. In these particulars, as Chief Justice Marshall said, "America has chosen to be a nation." "In war," said that great judge in 1821, "we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one. . . . America has chosen to be in many respects and to many purposes a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme." When, a few years ago, it was denied, as it has often been, that Congress could forbid the transmission of objectionable matter through the mails, distinguished counsel urged before the Supreme Court that since the express powers given in the Constitution were limited in their exercise to the objects for which they were intrusted, the power to establish post-offices and post-roads was restricted to the furnishing of mail facilities. But the court replied: The States could have excluded this mail matter before the Union was formed; and "when the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that grant effective."¹ Many times has this doctrine been reasserted by our highest court, that when a great

¹ *In re Rapier*, 143 U. S. 110.

sovereign power, like those referred to by the Chief Justice, has been conferred, in however few words, all of it was given, unless some qualification was to be found in the Constitution itself; and that the general limitations of the Constitution related rather to the number of the powers than to the reach of them. They are intrusted to the general government, to be used as absolutely as the States themselves could have used them; in handling those general interests which they confided to the nation.

The power of acquiring colonies is an incident to the function of representing the whole country in dealing with other nations and states, whether in peace or war. The power of holding and governing them follows, necessarily, from that of gaining them. Upon the power of acquiring colonies the Constitution has no restraint upon the sound judgment of the political department of the United States.

Now let us observe an important point: when a new region is acquired it does not at once and necessarily become a part of what we call the "territory" of the United States. Or, to speak more exactly, the people in such regions do not necessarily hold the same relation to the nation which the occupants of the territories hold. It is for the political department of the government, that is, Congress or the treaty-making power, to determine what the political relation of the new people shall be. Neither they nor their children born within the newly acquired region, necessarily become citizens of the United States. Take, for illustration, the case of our tribal Indians. Always many of them have lived within the territories of the United States. Our government has mainly followed the example of our English ancestors of recognizing them as tribes rather than individuals. Congress and the treaty-making power have dealt with them as a separate people, who have their own rules, customs and laws, although living on our land. While regulating "commerce with the Indian tribes," to use the phrase of the Constitution, and so laying down rules for governing the intercourse between Indians and others, and punishing crimes committed by tribal Indians on whites, or *vice versa*, Congress has never yet, by any wholesale provision, undertaken to bring them fully under subjection to us. That Congress might do this at any time, is settled. It has done it partly and by steps and degrees, as much as it pleased, all along. It has ended the business of making treaties with them, and has begun to punish crimes committed by one tribal Indian on another in the Indians' own country

And yet the Supreme Court has held that the Fourteenth Amendment did not make tribal Indians citizens of the United States. That Amendment, coming into effect in July, 1868, provided that "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are citizens of the United States. Distinguished persons used to think that all tribal Indians born in our country, like the Chinese, as recently held, were thus made citizens of the United States. That was the publicly expressed opinion of Senator Hoar and of Senator Morgan. But fifteen years ago the contrary was decided by the Supreme Court of the United States.¹ Since they are born, said the Court, "members of and owing immediate allegiance to one of the Indian tribes, an alien though dependent power, although in a geographical sense born in the United States," they are in the same case with children of a foreign ambassador born here. Yet, remember, we hold these people, the Indians, in the hollow of our hand; it is in our power, and has been from the beginning, and not in theirs, to say whether they shall continue to hold this relation. We can reduce them at any moment to full subjection; so that we are to observe that the question of whether, while living and being born here, they shall become citizens, is a question to be determined by the mere will and pleasure of Congress. Long ago, more than fifty years ago, in affirming the right of the United States to exercise its jurisdiction in the "Indian country," Chief Justice Taney, giving the opinion of the Supreme Court, said, "But . . . were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political power of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority." We may take it, then, as settled, that it is for Congress or the treaty-making power to say what shall be the permanent political position of the new people. As to no one of them is it yet determined, except in the case of Hawaii, that it is a "territory."

The Spanish possessions are held now and will continue to be held, as we held the southern states after the War of the Rebellion, under military government. Such a government may continue as

¹ *Elk v. Wilkins*, 112 U. S. 94.

long as the political department finds it desirable ; and it should continue long enough to allow of the most deliberate attention to the problems involved. There is an instance, as a learned friend informs me, in South America, still continuing, of a region taken from Bolivia by Chili and held under military government, pending negotiations, for the past fifteen years. As regards permanent arrangements, we may, if we please, set up a native government, with or without a protectorate, or we may perhaps establish some other status of partial allegiance analogous to that of our tribal Indians, or we may govern them precisely as we have governed our territories heretofore.

And this brings us to the question of the government of these territories, — a great, important, and ill-understood topic. Hawaii, as I said, has become a "territory." The other islands have not. What is it, to be a "territory" of the United States? It is this: It is to be a region of country belonging to the nation, and under its absolute jurisdiction and control, except as the fulness of this control may be qualified in a few particulars by the Constitution. As regards self-government and political power, a territory has no constitutional guaranties; its rights, in these respects, are what Congress or the treaty-making power thinks it well to allow. It has no right to become a State unless it shall have been so stipulated with the former owner when ceding it. The opinion that we can only hold territory for the purpose of nursing it into a State is merely a political theory. We have the constitutional power to do what it seems wise to do; that matter is left wholly open to the political department. A territory may be governed directly by Congress, as the District of Columbia, formerly called the Territory of Columbia, now is; or it may have such portion of self-government as Congress chooses to allow it. But if any is allowed, it may all be taken away at any moment. We send out from Washington to the territories, and always have sent to them, their governors, secretaries, marshals, and judges. Their whole executive and judicial power is imposed upon them by the United States. They have not, always, even had legislative power; and we may and do abolish and change their laws when we please.

Now observe, this is exactly the process of governing a colony. In fact these territories are, and always have been, colonies, dependencies. There is no essential difference between them and the leading colonies of England, except that England does not, and would not dare to exercise as full a control over her chief colonies

as we do over ours. I observe in a recent magazine ("Harper's Monthly," for January, 1899) a valuable and accurate statement on this subject by Professor Hart, our learned and indefatigable professor of history at Harvard. He remarks truly that the United States, for more than a century, "has been a great colonial power without suspecting it;" and he points out that the conception of a colony is that of a "tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration, instead of to the people of their own region." Great distance, he remarks, is not necessarily involved, nor physical separation from the home country, nor the exercise of arbitrary control, nor the presence of an alien and inferior race. "The important thing about colonies is the co-existence of two kinds of government, with an ultimate control in one geographical region, and dependence in the other; and since 1784 there has never been a year when in the United States there has not been, side by side, such a ruling nation and such subject colonies; only we choose to call them 'territories.'"

When people permit themselves to talk, then, of "vassal states and subject peoples," as if the necessary condition of colonies, say of Canada or Australia, or our territories, were one of slavery; when they talk of the holding of colonies as contrary to the spirit of our free institutions, of its being un-American, and having a tendency to degrade our national character; when they quote and pervert the large utterances of the Declaration of Independence, and remind us, as if it were pertinent to any questions now up, that government derives its just powers from the consent of the governed, — let them be reminded of our own national experience. Has it been "un-American" to govern the territories and the District of Columbia as we have? Has it been contrary to the fundamental principles of free government or the Declaration of Independence? Has it tended to the degradation of our national character? Has England suffered in her national character by governing Canada and Australia as she does? Or have England and the United States done sensibly and well in so doing? England had learned, and taught, the lesson of where the just powers of government come from, as long ago, to say the least, as 1688, when she gave the death blow to the doctrine of the divine right of kings. Ninety years later we had to remind her of that great doctrine, when she was making us suffer from a stupid and oppressive

form of colonial policy. But the entire recent history of England and of the United States shows that a wise and free colonial administration, as regards the people who are governed, is one of the most admirable contrivances for the improvement of the human race and their advancement in happiness and self-government, that has ever been vouchsafed to men.

On this head let me say one or two things more. We are going to have many perils and to commit many blunders in our new career; and yet we shall have some great gains. Not the least of the benefits will be found in the reflex effect of colonial administration upon the home government, and its people and public men. These new duties will tend to enlarge men's ideas of government and the ends of government. Our own experiments in the territories have been comparatively simple; so that already, in discussing our larger problems, we are finding good from having them forced upon us. The follies of the silver agitation and of much of our policy as to revenue, navigation, and trade; and the childish literalness which has crept into our notions of the principles of government, as if all men, however savage and however unfit to govern themselves, were oppressed when other people governed them; as if self-government were not often a curse; and as if a great nation does not often owe to its people, or some part of them, as its chief duty, that of governing them from the outside, instead of giving them immediate control of themselves; — these things are taking their proper place in the wholesome education of the discussions that are now going forward. There is good ground to expect, I think, that among the incidental advantages of our new policy may come to us a larger and juster style of political thinking, and I may add, of judicial thinking, on constitutional questions, and a soberer type of political administration. Even the nettle danger is to help us in these respects.

I have something more to say of our territories. And first let me shortly trace their history. Before the Revolutionary War was over, and several years before the Constitution of the United States took effect, the Confederation had begun to receive cessions of territory from the original States. The process continued after the present government came into existence; and by the year 1802, the United States held, under these cessions, besides the District of Columbia, a vast region now represented by nine States, namely, by a part of Minnesota and by the States of Wisconsin, Michigan, Ohio, Indiana, Illinois, Tennessee, Alabama, and Mississippi.

These regions now belonged to the nation. They were not States, but they had been accepted by the national government under a guaranty that eventually they might become States. It was not necessary to make such a guaranty; the Constitution did not require it; it was purely an arrangement of policy. Then, in 1803, came that enormous accession, by purchase from France for \$15,000,000, of a tract reaching (as we afterwards insisted in the Oregon controversy) from the mouth of the Mississippi to the Pacific at Vancouver, a region vastly larger than the original country east of the Mississippi.¹ These great regions, all together, composed what Marshall called in 1820 the "American Empire." The new tract included what now makes up fifteen States and two territories; namely, the States of Washington, Oregon, Montana, Idaho, Wyoming, the two Dakotas, Nebraska, a part of Minnesota, Colorado, and Kansas, the States of Iowa, Missouri, Arkansas, and Louisiana, the territory of Oklahoma and the Indian Territory. At the end of the next decade, in 1819, this example of purchasing territory was followed by gaining from Spain the territory of Florida, at an outlay of \$5,000,000. Then, in 1845, came a joint resolution of Congress, not a treaty, by which the republic of Texas was added directly to the Union, as Vermont and Kentucky had been in 1791 and 1792, without ever passing through the pupilage of a separate dependency of the nation. Then followed war with Mexico, on a question of the true boundary of Texas; and as our neighbor, Mr. John Fiske, tells us, in his valuable history of the United States, "When peace was made with Mexico in February, 1848, it added to the United States an enormous territory, equal in area to Germany, France, and Spain added together." This was supplemented by a purchase from Mexico in 1853. The whole region is now occupied by five States and two territories, namely, by the States of California, Nevada and Utah, a part of the States of Colorado and Kansas, and the territories of Arizona and New Mexico.

Then in 1867 came the purchase of Alaska from Russia for \$7,000,000. This was a novel accession; for it was no longer contiguous territory that was bought in, but a region separated from us by a breadth of foreign country covering several degrees of latitude. Alaska stretches towards the north for more than fifteen degrees, and away up into the Arctic Ocean. It reaches westward until its

¹ It is well known that our claim went farther, — both as regards the grounds of it, and the region it covered.

mainland is only separated from Asia by about fifty miles of water, at Behring Straits. And then our Aleutian archipelago continues out under the continent of Asia, into the longitude of New Zealand. This acquisition shifted the geographical middle of our country so as to place it some way out in the Pacific Ocean.

And now we reach the recent and pending cessions. The Hawaiian Islands have now, six months ago, been added to our territories. They are 2100 miles out in the ocean, southwesterly from San Francisco, in the latitude of Puerto Rico and Cuba, and in the longitude of the western mainland of Alaska. Having failed in accomplishing this annexation by a treaty, the promoters of it secured the result, after the example of Texas, by a joint resolution, during the war with Spain and as an incident to it. The resolution is simply the acceptance of an unconditional offer from Hawaii. In the language of the resolution, "Said cession is accepted; . . . the said Hawaiian Islands and their dependencies are hereby annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof." Till Congress provides for their government they are under the President's supreme control. A few temporary provisions only, as to customs, treaties, and immigration, are made in the resolution. No promise of becoming a State has been made, and no assurance as to the status or control of the population.

The proposition now pending in Congress for the establishment of a territorial government in Hawaii gives these islands the full status of a territory of the United States, under a governor and territorial secretary appointed by the President, with power in the governor to appoint the judges and other officers, with the consent of the territorial senate. The legislature is to be composed of a house of representatives elected by the people who are male citizens of the United States twenty-one years of age; that is, as it is rather oddly expressed, "all white persons, including Portuguese and persons of African descent," and all of the Hawaiian race who were citizens of the Hawaiian Republic just before the transfer of the sovereignty to the United States; and of a senate, elected by such persons as could vote for representatives, being also owners in their own right of real property in the territory of not less than \$1000, and paying taxes for the last year, or being in receipt during that year of a money income not less than \$600.

The commissioners who have prepared a form of government for Hawaii intimate an opinion that it cannot form a precedent for

the other islands now acquired or coming in. They suggest the need of more outside control for the new possessions. "The underlying theory of our government," they say, "is the right of self-government, and a people must be fitted for self-government before they can be trusted with the responsibilities and duties attaching to free government." And again they say that "the American idea of universal suffrage presupposes that the body of citizens who are to exercise it in a free and independent manner have by inheritance or education such knowledge and appreciation of the responsibilities of free suffrage, and of a full participation in the sovereignty of the country, as to be able to maintain a republican government."

What I have said, so far, tends to show that there is no constitutional difficulty in our acquiring, holding, and permanently governing territory of any sort and situated anywhere. Whatever restraints may be imposed on our congress and the executive by the Constitution of the United States, they have not made impossible a firm and vigorous administration of government in the territories. Witness especially the case of the District of Columbia and the Territory of Utah. It is not to be anticipated that they will have any such effect in our island dependencies.

But what exactly is the operation of the Constitution in the territories? A difficult question, and very fit to be deliberately and fully considered by Congress and by the Supreme Court: a question never yet satisfactorily disposed of; perhaps one not to be answered finally by a court. It would be easy to cite dicta and even decisions that extend the Constitution and what we call its bill of rights to the territories; but no judicial decision yet made has thoroughly dealt with the matter, or can be regarded as at all final on a question so very grave.

It is sometimes supposed that the effect of the early amendments and other parts of the Constitution which make up what is called its bill of rights, is that of absolutely withholding power from the nation to govern in the forbidden way; not merely within the States, but within the territories, and anywhere and everywhere, and under all circumstances whatever; so that, for instance, no criminal trial could proceed anywhere under the authority of the United States without those safeguards of a grand jury and petit jury, which would be necessary within the States. But that is not so.

Let me explain what I mean by an illustration. Nineteen years

ago, a seaman upon an American vessel, charged with murder committed in the waters of Japan, was tried in that country before the American consul and four associates. Against his objection that he was entitled to be accused by a grand jury and tried by a petit jury, he was found guilty by the consular tribunal and sentenced to death. The President of the United States commuted his sentence to imprisonment for life in the State prison at Albany. Ten years later the convict sought by a writ of habeas corpus for a discharge on the ground that he was held in violation of the Constitution in that he was entitled to a jury and a grand jury; and that the legislation of Congress, under the treaty, providing for the consular tribunal which tried him, was unconstitutional. But he was remanded, and the court declared, by the mouth of Mr. Justice Field, that the Constitution had established a government "for the United States of America, and not for countries outside their limits. The guaranties it affords," they went on to say, ". . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad."¹

We observe in such a case that our Congress may constitutionally authorize a capital trial without either jury or grand jury, notwithstanding the express provisions of the Constitution and its amendments. The reason is that these provisions are not applicable to this sort of case. The Constitution has to be read side by side with the customs and laws of nations. The operation of our Constitution is not to create a legislative body which is wholly bereaved of power to do anywhere the things which are forbidden within the United States. It is not stricken with inability, destitute of power, as if paralyzed, on these subjects, anywhere and everywhere and under all circumstances. The prohibitions, although they do not say it, deal only with certain circumstances and persons and places.

But to return to the specific question as to the situation of the territories. Hawaii, as I have said, is now a "territory;" and other islands, although not made "territories" by the treaty, may become such by Act of Congress. It is probably the prevailing legal opinion to-day that a citizen of a territory is a citizen of the United States, and that children born in the territories and subject to our national jurisdiction are citizens of the United States. Probably,

¹ *In re Ross*, 140 U. S. 453.

also, it is the prevailing legal opinion, supported by some judicial decisions, that the territories are a part of the United States, not merely in the eye of international law, as all agree, but in the sense of our municipal law; so that *e. g.* as judges have said, taxes must be uniform there and in the States. There is also judicial authority for the opinion, and I suppose it is the more common opinion, that those parts of the Constitution securing trial by jury and other personal rights are applicable to the territories.

There is, however, little in the text of the Constitution itself, and little, in point of intrinsic reason, in the judicial opinions and dicta on these subjects, to prevent us from holding that the Constitution does not cover the territories, and that the power of the United States in governing them, except as to one or two particulars, is to be measured only by the terms of the cessions which it has accepted, or of the treaty under which a territory may have come in. It may be observed that States and foreign countries in making their cessions inserted such conditions and guaranties of right as they thought necessary. Beyond these restraints it may well be thought that the territories are subject to the absolute power of Congress.

I will not go into detail in discussing these matters now. It would take too much time, and would require much too technical a discussion to be appropriate to this time and place. But let me refer to a single head of the Constitution, in its relation to the territories, on which the law is perfectly settled, and which furnishes a clear suggestion for a right solution of some at least of the questions in hand.

The great difficulty when the United States Constitution was made, was the adjustment between the power of the States and of the United States. The territories played no part at all. They were disposed of in the Constitution, so far as anything was said of them, by placing them wholly under the control of Congress. Article IV., Section 3: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." In Article I., Section 8, Congress is also given power of exclusive legislation in all cases whatever over the district, not exceeding ten miles square, where the seat of government should be fixed, and over places purchased by consent of the States for forts and the like. Congress might admit new States; and these, no doubt, might be made out of the territories, because Congress had already promised to admit States out of the Northwest Territory. The

territories of that period had belonged to the States, and whatever privileges the States wished to secure they could and did secure in the terms on which they were ceded. The great anxiety was to make a strong enough central government and yet prevent the United States from encroaching on the rights of the States or of the people of the States. One sees no sign of any anxiety on the part of the makers of the Constitution as to the status of people belonging to regions then ceded to the national government or thereafter to be ceded. That was a matter which had been attended to in the cessions actually made by the parties who made them; and it might fairly be presumed that it would be attended to in future cessions, so far as might be desired and found convenient between the parties concerned. What was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest Territory would require different treatment; and restraints beneficial in the one case would be harmful in the other.

It was perfectly natural, therefore, and to be expected, when in dealing with the third article of the Constitution providing for the distribution of "the judicial power of the United States" and the tenure of the judges, that it should be treated as having no application to the territories. The Constitution provides that all its judges shall hold office during good behavior. But in regulating the judicial system of the territories Congress has always appointed the judges for a term of years, and not during good behavior. Seventy years ago, Chief Justice Marshall said: "These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is conferred in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."¹ This doctrine has always been acted on. In 1871 the court said, through Chief Justice Chase: "There is no supreme court of the United States nor is there any district court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are

¹ *Am. Ins. Co. v. Canter*. 7 Peters, 511.

not appointed for the same term, nor is the jurisdiction . . . part of the judicial power conferred by the Constitution on the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territory belonging to the United States."¹

But now observe, if the restraints of this part of the Constitution do not operate in the territories, why should those of the rest of it reach them? If the judicial system of the United States was meant only for the United States in the narrower sense, as including the States themselves, the conclusion seems, as I am inclined to believe it, a just one, that the Constitution generally was not meant for the territories, except as it may in any place expressly or plainly indicate otherwise; and that its provisions committing the territories to that full control of Congress which is expressly mentioned, and to its implied authority to govern, involved in the power to acquire, carry an absolute authority over them, except as there may be any plain expression of restraints. Such was the opinion of Chancellor Kent as expressed in his Commentaries in 1826, and never changed. He said: "If . . . the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River to the west of the Rocky Mountains, it would afford a subject of grave consideration what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into independent States; and in the mean time upon the doctrine taught by the Acts of Congress and even by the judicial decisions of the Supreme Court, the colonies would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and Parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever."

Let me refer to a valuable paper on this particular question in a magazine called the "Review of Reviews," for January, 1899, by Professor Judson of Chicago. He examines the subject carefully and with references to some of the decisions, and reaches the conclusion that only in an international sense can it be said that the territories are a part of the United States, as that phrase is used in the Constitution.²

¹ *Clinton v. Englebrecht*, 13 Wall. 434.

² See also the very valuable investigation of the text of the Constitution by Professor Langdell, in the last number of this REVIEW, leading up to the same conclusion.

II. So far I have pointed out two things: First, that we no longer have before us the question of whether we will take on extra-continental colonies or not. We actually have them now. Our real question is what to do with them. And, second, as preliminary to the question what we shall do with them, I have been considering what is the compass of our power. I have pointed out that after the ratification of the treaty, we shall still have absolute power to determine what the political relation of the Spanish islands to us shall be, and so the scope of our governmental control over them; and that if they should be annexed, so as to be identified, in status, with the territories, we shall still have full power to deal with them, subject only to any applicable restraints of the Constitution of the United States; so that we may govern these extra-continental dependencies as we have in fact, ever since the beginning of our nation, governed our continental colonies, namely, the territories and the District of Columbia. And I have shown how it is that we have acquired and governed these, namely, in a manner which nearly corresponds to the method of England in governing her freest colonies; only more stringent and less free.

I may add that the restraints of the Constitution would probably be found less embarrassing in governing a barbarous or semi-barbarous people than might at first sight be thought; just as they have been found not seriously to interfere with the carrying on of war with rebellious States. That instrument was made, and is to be read and applied, in the atmosphere of the common law and of the law of nations; and with a constant tacit reference to that accumulation of principles and maxims of sound reason and good sense which temper all applications of it to actual affairs. When our own people, owing allegiance, will not be governed as they should be, they may still be governed somehow; and under the Constitution they may be governed as it is necessary to govern them, according to the actual circumstances of the case. They cannot throw off the authority of the nation; they must accept it in such form as is practicable under the circumstances that they themselves create. Let me add, in order to prevent a possible misunderstanding, that in matters of substance the restraints of the Constitution will not often be felt as restraints in the government of colonies by a civilized nation in modern times. Such a nation, like England, is likely to restrain itself within narrower lines than the Constitution requires, from mere policy, and from its own sense of humanity and justice.

And now let me very briefly and very summarily speak of our policy and of our duty. I will not enlarge here.

1. In the first place, we must face and take up the new and unavoidable duties of the new colonial administration, however unwelcome they may be, handsomely and firmly. There is no question now of any choice as to whether we will have a colonial policy.

2. The case of Hawaii should await the settlement of the general problems now coming into view, arising out of these new dependencies. The case of all the islands will be in many respects the same. They should all be dealt with together.

3. We should ratify the treaty; and then determine the fate of the Philippines after very full and careful consideration. The treaty simply detaches these islands from Spain and secures for us the opportunity to do this. As things now stand, the policy of throwing them back upon Spain or upon themselves, merely because we individually do not want them, and because it is easier to defeat the treaty than it is to accomplish afterwards a particular disposition of them that one may himself prefer, seems to me unworthy of the nation and of the subject in hand. It is dealing too hastily with a great and serious problem; and it is discrediting our own capacity to handle it with wise deliberation.

4. Having ratified the treaty, let us be in no hurry to close the grave questions that will present themselves as to the permanent status of the islands. These should all continue, for the present, to be governed under executive and military control; and meantime with the utmost possible care we should study the true settlement of these questions.

5. Let us beware, at every step, promising to the islands, not excepting Hawaii, any place in the Union. Here, as elsewhere, we shall find England's sensible policy our best guide. We cannot imagine Great Britain's letting in her colonies to share the responsibility of governing the home country and all the rest of the empire. In France, indeed, that mistake has partly been committed; but we are hearing now the solemn warnings of the French against such a policy. Never should we admit any extra-continental State into the Union; it is an intolerable suggestion. I am glad to observe that it is proposed in Congress to insert in the statute for the settlement of the Hawaiian government the express declaration that it is not to be admitted into the Union. The same thing should be done with all the other islands. The remark attributed to a judge of the Supreme Court of the United

States in presiding, lately, over a popular meeting in Washington, that we have no power to hold colonies except for the purpose of preparing them to come in as States, has no judicial quality whatever. It is simply, as I have already said, a political theory entertained by some persons, but resting upon no ground of constitutional law.

6. Furthermore, considering the danger which attends a close division of parties, and our unfortunate experience of recent years in admitting States ill-prepared to become members of the Union, we ought to guard against the excesses of party spirit on so grave a subject, by amending the Constitution and limiting the States of the Union to the continent. After the great convulsion of thirty odd years ago we found it necessary to amend the Constitution before settling down again. Equally after this war, attended by such momentous results, we have abundant reason to proceed in the same way. Such amendments are difficult, but they are not impossible; nor are they necessarily so very long in being accomplished. The Twelfth amendment was in force in about nine months after it was proposed.

Guarded by such an amendment it appears to me that we might enter upon the new and inevitable career which this Spanish war has marked out for us, with a good hope of advancing the honor and prosperity of our country and the welfare of mankind.

James Bradley Thayer.

January, 1899.

RAILWAY CONSOLIDATION ON THE
INDIANA-ILLINOIS LINE.

IN 1895 the Supreme Court of Illinois decided that in the absence of authority granted by special charter before the present Constitution, railway corporations of Illinois had no authority to consolidate with corporations of other States, and that for this reason where a combination formed by a railway company organized under the general laws of Illinois and corporations of other States had given a mortgage upon their entire property, the mortgage constituted no lien whatever upon the property in Illinois, and that the bonds were to this extent without security.¹

This decision surprised many of the Illinois bar and many holders of railway securities. All roads of importance operating within the State extend beyond its limits, and changes of corporate organization are continually necessary. Prior to 1874 railways were authorized by statute to consolidate with companies whether organized in Illinois or elsewhere, but in that year this statute was repealed, and the legislature appeared to declare a policy adverse to such consolidations. In subsequent legislation this policy has been emphasized, as in the Act of May 24, 1877, which expressly provides that nothing therein contained shall authorize consolidation of railway corporations of Illinois with those of other States,² and in the proviso of the Act of March 30, 1875,³ that nothing therein should be construed to authorize foreign railways to become the owners of any railroad in Illinois.⁴ By the Act of June 14, 1883, an exception was made to the general rule forbidding consolidation with railway companies of other States, so far as to provide that whenever a railroad situated partly in Illinois and partly in another State and theretofore owned by a consolidated corporation had been sold under decree of court and purchased as an entirety in the name of corporations organized under the laws of different States, these corporations might consolidate. With this exception, however, the

¹ *American Loan & Trust Co. v. Minnesota & Northwestern R. R. Co.*, 157 Ill. 641

² Starr & Curtiss, *Stats. of Ill.*, 2d ed., iii, 3248.

³ Starr & Curtiss, *Stats. of Ill.*, 2d ed., iii, 3240.

⁴ Starr & Curtiss, *Stats. of Ill.*, 1st ed., ii, 1917.

legislative policy of Illinois continues adverse to such consolidations.

Since the repeal of the statute in 1874 a number of roads operating across adjoining States have refused to consolidate with corporations of Illinois, but have made their terminus at the Illinois State line, and have reached points within the State by means of leases, operating contracts, or stock ownership.

Most railways have, however, refused to follow so conservative a course, and many so-called consolidations have been made as though the act authorizing consolidation were still in existence. Securities have been issued by these consolidated companies for many millions of dollars, and the rule announced in the American Trust Company case throws great doubt upon the validity of all these transactions. The result has been the passage, in 1897, of a statute ratifying consolidations made by corporations of Illinois and those of other States between July 1, 1874, and July 1, 1883.¹

There may be some doubt whether this statute can have the intended effect, but in any event it gives no authority for the many consolidations which have been made during the last fifteen years. Among the interests thus threatened are some very valuable securities, and the questions presented are, by reason of their magnitude, of national importance.

Beside these two methods of dealing with the law, — that is, of directly obeying or disobeying it, — there also developed upon the Indiana-Illinois State line a third course by which some lawyers have considered that the fruits of consolidation might be obtained without the fact. This is the method now in vogue when railway corporations operating eastward from Illinois are united. Large investments have been made and are making upon faith in the validity of this scheme. It may be that this faith will be justified, but whatever the ultimate result, it seems clear that those who make these investments take a substantial present risk.

It is the policy of Illinois that railroads within the State shall be operated by domestic corporations. Until recently and with a single exception,² an Illinois railway could not sell its road to a foreign corporation, but, so far as the Illinois law was concerned, could purchase a railway in another State.

The statutes of Indiana provide that companies organized under

¹ Session Laws of Illinois, 1897, 198.

² Act of 1895, Starr & Curtiss, Stats. of Ill., 2d ed., iii, 3240.

the laws of that or of any adjoining State whose roads connect upon the State line or elsewhere may join and unite their roads and merge and consolidate their stock upon such terms as may be mutually agreed upon in accordance with the laws of the adjoining State with whose railroads connections are thus formed.¹

This last phrase does not adopt the law of adjoining States, but is construed as requiring that the terms of the agreement of consolidation be not in conflict with the laws of those States.²

The laws of Indiana, like those of Illinois, do not authorize a domestic company to sell or lease its property to a foreign corporation. The question that presents itself, therefore, is whether a purchase of an Indiana road can be effected by an Illinois corporation in such a way that it will be regarded in Illinois as a purchase and not a consolidation, and in Indiana as a consolidation and not a sale.

It is said that all the requirements of this situation are met when the two companies make an agreement, by which the Indiana road transfers all its property to the Illinois corporation and passes out of existence, while the Illinois company, in consideration for this conveyance, issues its stock directly to the Indiana stockholders. Consolidations often take the form of purchase and sale,³ and it is not necessary that both constituent companies should continue to exist. Sometimes consolidation is made by dissolving both companies, or by dissolving either one, while preserving the other company and issuing its shares to stockholders in the dissolved company.⁴

It appears, therefore, that the use of the word "consolidation" in the Indiana statutes does not alone require that when consolidation is made, the constituent companies shall all continue their existence.

This apparently is the understanding of the courts of Indiana.

In *Jessen v. Commissioners of Lake County*,⁵ the court said: "Under our statute providing for the consolidation of railroad companies, the consolidation is the result of contract between such

¹ Act of February 23, 1853, amended March 8, 1897. Burns, Annotated Stat. of Indiana, § 5257.

² *Bradford v. Railway Co.*, 142 Ind. 383.

³ *Thompson, Corporations*, i, § 324; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 46; *Racine, etc. R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331.

⁴ *Morawatz, Corporations*, § 942.

⁵ 95 Ind. 567-577.

companies, and the question as to whether either or both of the original companies, by reason of the consolidation become extinct or cease to exist, must depend very largely, if not entirely, upon the terms of the contract of consolidation mutually agreed upon in each particular case."¹

In *Cashman v. Brownlee*,² the court quoted approvingly from *Rorer on Railroads*³ the statement that "the Legislature may allow a consolidation of two railroad corporations whereby the one so merged loses its corporate existence. . . . The company so merged, that is all its members, pass into and become members of the company into which it is merged."

It is at this point in the consideration of the Indiana decisions that we reach the very suggestive case of *Easton & Hamilton Ry. Co. v. Hunt*.⁴ In that case, an Indiana railway corporation had sold and conveyed its property to a corporation of Ohio, taking in payment stock in the Ohio Company, which was distributed to the stockholders of the Indiana Company. It does not appear that counsel attacked this proceeding, and no doubt as to its validity is suggested in the opinion of the court.

*Branch v. Jesup*⁵ resembles the *Hunt* case. The South Georgia and Florida Railroad had been authorized to construct a line from Oglethorpe to Albany; from Albany to Thomasville, and from Thomasville to the Florida line. Its powers authorized it to purchase and sell all kinds of property, and to incorporate its stock with that of any other company.

Acting under these powers, it entered into a contract with the Albany & Gulf Railroad Company to construct a road from Thomasville to Albany, and to sell it to the Gulf Railroad Company, together with the franchise of using it, receiving pay therefor in the stock of the Gulf Road. The transaction was carried out and sustained.

The court after referring to the authority of the Georgia Company to purchase and sell property of all kinds and to consolidate its stock with the stock of other companies, goes on to say: —

"It seems to us clear that these powers were sufficient to enable the company to sell its road and franchises to any company competent to purchase them. As a general rule, it is true, a railroad company with only the ordinary power to construct and operate its road cannot dispose

¹ See also *Crawfordsville, etc. Co. v. Fletcher*, 104 Ind. 97-106.

² 128 Ind. 266-269, 270.

⁴ 20 Ind. 457.

³ i, 38.

⁵ 106 U. S. 468.

of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises, connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilling of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country, the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply. In view of the large power thus conferred upon the South Georgia and Florida Railroad Company, we cannot doubt that it had full power to enter into the arrangement made with the Atlantic and Gulf Railroad Company for the transfer of that portion of its line extending from Albany to Thomasville, including the franchise of constructing and using the same and an incorporation of all its stock, issued for the construction of said road with the stock of the latter company."

If these were all the authorities on the subject, it would seem that the method of consolidation under consideration was authorized by law. There is, however, an embarrassing decision to be found in the case of *Commissioners of Tippecanoe County v. Railway Co.*¹ In this case the question arose as to the validity of an agreement made by an Indiana company with an Illinois company whereby the Indiana company leased its road for 999 years, giving to the lessee the option to purchase the property. It was treated, however, by the court as a sale, "different from a sale and

¹ 50 Ind. 8

delivery in nothing except that the consideration for the transfer is paid semi-annually instead of in a sum total. The true character of the instrument, therefore, if the parties choose so to treat it, is that of a sale; and it seems to us a perversion of the meaning of words, and an evasion of law, to give it any other interpretation."

In passing upon it in the character of a sale, the court says: —

"But it is urged by the appellees that there is authority of law for making the contract in question, if not in express terms, yet by fair interpretation, whether it is called a lease or a sale; and they cite the Act of February 23, 1853. That act is 'to authorize railroad companies to consolidate their stock with the stock of railroad companies in this or in an adjoining State, and to connect their roads with the roads of said companies,' etc. The title nowhere mentioned a lease or a sale. Indeed, the words 'to connect their roads with the roads of said companies' would seem to exclude such a conclusion. To connect one road with another does not fairly mean to lease it or to sell it to another."

This case appears to establish in Indiana the present rule that domestic railways may not lease or sell their roads. "We look in vain in this latest decision of the State for an assertion of the proposition that, by the laws of that State or by the decisions of its courts, there exists any law by which one railroad company can, by lease or by any other contract, make an absolute surrender of its road and its franchises to another. And yet that was the question under discussion, and because the lease in that case continued a clause of perpetual renewal, and in effect amounted to a sale, the court held it *ultra vires*."¹

In the recent *Vandalia* case² this construction of the Indiana statute was reaffirmed. It is true that in both of the cases last referred to the question involved concerned the right of an Indiana railway to become the lessee of the property of another corporation, but in the opinion of the court the general effect of the Indiana statute was necessarily considered, and the statements quoted holding that the power granted to railroad companies by this statute to consolidate with other companies and to connect with other roads, does not carry with it the power to sell their property or franchises, are in accordance with the weight of authority upon the subject, especially in the case of interstate railways where a sale would turn

¹ *Pennsylvania Co. v. St. Louis, etc. Co.*, 118 U. S. 290, 313, 630, 634.

² *St. Louis Rd. v. Terre Haute Rd.*, 145 U. S. 393, 404-405.

the property over to a foreign corporation.¹ As emphasizing the fact that general language will not apply to an interstate railway when it will apply to a domestic road, there is an interesting decision in New Jersey which holds that a statute in general terms authorizing railroad companies to lease their properties will not authorize a domestic company to lease its property to a foreign corporation,² and many other decisions of this character may be found.

This review of the cases indicates that a transaction which amounted to nothing more than a sale by an Indiana road of its property to an Illinois company could not be justified under the Indiana statute. The rule is that an Indiana corporation cannot sell its road to a corporation of Illinois. Sale may be defined as the act of parting with property for a consideration, reserving to the vendor no control over the property conveyed.

Substituting this definition for the word, we have the rule that an Indiana railway company may not convey its property to an Illinois company without reserving to itself, the Indiana company, some control over the property conveyed. An Indiana corporation may, so far as concerns Indiana, consolidate with an Illinois company, but this consolidation must be of such a character that the domestic corporation will continue to exercise some control over its corporate property. In other words, consolidation which will be supported by the Indiana laws must be something more than a mere sale.

Coming now to the Illinois law, we find that a railway corporation of that State is without power to consolidate with a railway corporation of another State, but may purchase the property of a foreign company. This is precisely what Indiana does not allow, and no progress in this direction can be made under the Illinois statute. It is at this point that the difficulties are much increased by the decision of the Supreme Court of Illinois in *Chicago, etc. R. R. Co. v. Ashling*.³ This case holds that where one corporation transfers all its property to another corporation in consideration of stock in the second corporation issued to stockholders in the first corporation, the transaction amounts to a consolidation, and is not a mere purchase and sale.

¹ Cook, *Corporations*, 3d ed., ii, § 894.

² *Black v. Railroad Co.*, 24 N. J. Eq. 456.

³ 160 Ill. 373.

A similar decision was very recently rendered in Indiana.¹ The present tendency of the courts seems, therefore, to be toward a holding that the combination of railway companies of Illinois and Indiana made in the manner described, will not be regarded as a consolidation in Indiana, and a purchase or sale in Illinois, but that on both sides of the line the combination will be regarded as an attempt to consolidate, lawful in Indiana but unauthorized in Illinois.

It appears, therefore, that a question exists as to the validity of the consolidation of railway corporations organized under the general laws of Illinois and Indiana, and that this question extends to and affects the legality of corporate securities. It is likely that some time this question will be settled in the courts, and if so the litigation will hold out no prospect of reward for those who so easily assume its risks, and in the case of unfavorable result may entail great disaster upon bondholders.

E. Parmalee Prentice.

CHICAGO, January, 1899.

¹ Railroad Co. v. State, 51 N. E. Rep. 924.

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THE STATUS OF OUR NEW TERRITORIES. —

CAMBRIDGE, February 7th, 1899.

DEAR MR. EDITOR, — In the last number of the *LAW REVIEW* at page 382, I cited an instance of the congressional use of the term "United States" in 1815, *i. e.*, twenty-five years and upwards after the adoption of the Constitution. I ought also to have cited another instance which occurred immediately after the adoption of the Constitution, *i. e.*, in the first session of the first congress. It will be found in the Act to establish the Judicial Courts of the United States, passed Sept. 24, 1789, c. 20, by which Art. 3 of the Constitution was put into operation. By §§ 2 and 3 of that Act, it is declared that the United States shall be divided into thirteen districts, in each of which there shall be a District Court; and it is provided that each state, except Massachusetts and Virginia, shall constitute one district, bearing the same name as the state; that the state of Massachusetts shall constitute the two districts of Massachusetts and Maine, and that the state of Virginia shall constitute the two districts of Virginia and Kentucky. While, therefore, there were only thirteen districts, there were yet two more districts than there were states; and this phenomenon is accounted for by the fact that there were then only eleven United States, Rhode Island and North Carolina not yet having adopted the Constitution.

It is certain, therefore, that the authors of this Act, who may also be said, without great exaggeration, to have been the authors of the Constitution, did not regard either the states of Rhode Island and North Carolina, or the great North-West Territory as constituting any part of the United States at the time when the Act was passed, and that they understood "United States" to mean the eleven states which had then adopted the Constitution.

Yours very truly,

C. C. LANGDELL

IMMUNITY OF DIPLOMATIC AGENTS. — It is well settled that a sovereign who visits a foreign country is free in respect to his person from all local jurisdiction. And to describe his precise legal position the term extra-territoriality is used, by which the monarch is conceived as being a portion of the state to which he belongs, though actually in the foreign country. Though it may well be true that in case of a sovereign or of the ambassador who is identified with him the immunity and the term which describes it are co-extensive, this picturesque metaphor must be regarded as a fiction of vivid description rather than a legal rule. The expression really becomes dangerous when it is used to account for the exemption from local laws of the suite, attachés and servants of a foreign minister. It would seem that the ambassador is entitled to their immunity because they are a necessary aid to him in his ministerial duties. And the exemption of these people who cannot be said to be identified with their sovereign extends only so far as is compatible with their usefulness in their official capacity. But it is clear that if an attaché commits murder the courts of the country to which he is accredited are powerless to punish him. The most that can be done is to apply for his recall to the State he represents. Hall, *International Law*, 3d ed., p. 168. Dana, *Wheaton's International Law*, 8th ed., § 225. When, however, he kills himself it is doubtful what course may be adopted. A step towards settling this doubt has just been taken in the case of Count Karolyi, an attaché of the Austro-Hungarian Embassy, noted in *The Law Journal*, Jan. 14th, 1899. The count committed suicide in Piccadilly and an inquest was held on his dead body. No objection was made to the interference of the English coroner, because the count was not a resident of the Embassy house, and therefore it was said that the privilege of extra-territoriality did not exist. The reason given is manifestly erroneous in applying a term of description as a legal rule. If anything can correctly be termed extra-territorial it is the person of the minister himself and not his dwelling. But the point raised is interesting. The very act which was wrongful terminated his office by ending his life. His usefulness to his country was ended — the public rights which had formerly attached to him had ceased to exist. Why should not his remains be subject to foreign jurisdiction? And yet a state has a right to demand the safe return of her diplomat whose term has expired. If the home office had expressly desired the return of the dead body without interference England no doubt as a matter of policy would have refrained from holding an inquest. But in the absence of such request her action can be sustained on the ground that, while an ultimate return of the remains is of course necessary, there is no reason why the ordinary course of procedure should not be invoked where the person of the attaché has lost all its public character.

CONSTRUCTIVE TRUSTS. — Equity, speaking strictly, never gives damages for an injury; rather it lays its command on the wrongdoer to make reparation for his wrong. It concerns itself not with what the complainant lost but with what the respondent gained, and in all cases where it has jurisdiction will force the wrongdoer to hold the proceeds of his wrong, no matter in what shape they then exist, for the benefit of his victim. But in the looser modern equity practice those fundamental principles, so clearly in line with natural justice, are often forgotten by both courts and complainants; it is refreshing then to come upon a case like

Woodrum v. Washington National Bank, December, 1898, 55 Pac. Rep. 333 (Kan.), where these principles are clearly set forth and soundly applied. There it appeared that certain mortgaged cattle in the hands of the mortgagee were destroyed through the tort of a third party. The mortgagee recovered from him a sum equivalent to his mortgage debt and in exchange for the balance of the judgment received a larger judgment against the mortgagor. It was held that the mortgagor might at his election charge the mortgagee for the amount of the uncollected balance of his judgment against the third party or take the judgments against himself as a constructive trust.

The injury to the complainant here was purely equitable, but the same principles are applicable — speaking broadly — to legal wrongs. A legal owner has the right to retake his property from the thief; it would seem that if the thief has disposed of the property, in all natural justice, the owner should likewise have a paramount claim against the proceeds. The only way in which he can get at those proceeds at law, by judgment in damages and attachment, is often hopelessly inadequate, — for instance, if the thief be insolvent; but equity, having taken jurisdiction because of the inadequacy of the legal process, will apply its own principles of reparation and declare a constructive trust of the proceeds in the hands of the thief. And certain courts, at least, will follow this reasoning. In the case of *American Sugar Refining Co. v. Faucher*, 145 N. Y. 552, where there had been a sale of chattels induced by fraud, it was held that the proceeds of a re-sale by the insolvent wrongdoer were a constructive trust for the victim of the fraud.

It is not easy to see just how far equity will go in its use of this sort of remedy, — clearly it is not applicable to every species of wrong. The question is finally one of policy, but the few precedents we have seem to group themselves — without regard to the nature of the right violated, whether legal or equitable — into two classes: cases where the wrong from which the proceeds arise is the misuse of another's property; cases where the wrong is a breach of some relation which is, in the broadest sense of the term, fiduciary.

SATISFACTION AS A CONDITION. — Whenever a contract contains a condition that the one party must be satisfied with the performance of the other or be under no obligation, the determination whether "actual satisfaction" or "reasonable satisfaction" is required is a question of interpretation. This was the issue in *Pennington v. Howland*, 41 Atl. Rep. 891 (R. I.). The defendant employed the plaintiff to make a pastel portrait of his wife, the contract providing that if the picture were not satisfactory the defendant should not pay. The portrait when finished was rejected by the defendant as unsatisfactory. Upon these facts, the court held that as the defendant was not actually satisfied the plaintiff had no cause of action; since, if the subject-matter of a contract involved personal taste, actual satisfaction was always necessary.

A promisee, if he be so indiscreet, may allow the promisor to condition his obligation upon his personal satisfaction. No rule of law or of public policy precludes the enforcement of such a condition, provided that the promisor acts in good faith. On the other hand the reference intended may well enough be to the satisfaction of the promisor as a reasonable man. The authority, however, is much in conflict; for the

courts have yielded to the temptation to lay down qualifying rules. When the subject-matter of the contract involves personal taste or judgment, an agreement that it shall be satisfactory to the promisor, it is said, necessarily makes him sole judge whether it answers that condition. *Gibson v. Lanage*, 39 Mich. 49. But when the satisfaction stipulated for involves other standards, such as quality, utility, salability, and the like, then, it is said, it is a necessary implication that he must decide as a reasonable man. *Duplex Co. v. Garden*, 101 N. Y. 387. However, these rules seem little more than attempts to classify the cases.

Upon principle the test should be the simple one of the actual intention of the parties. This is not to be sought by set rules of interpretation which foster fictions. The rules above recited express, it is true, certain postulates of experience which will guide the triers of fact — the court if the contract be written, the jury if the contract be oral. But to harden these into rules of law will often result in imposing upon one of the parties a liability which neither intended that he should assume. This view, moreover, that it is a problem of fact whether actual or reasonable satisfaction be requisite is well sustained by authority. *Singerly v. Thayer*, 108 Pa. St. 291; *Wood Co. v. Smith*, 50 Mich. 565. The decision in the principal case that satisfaction there meant personal satisfaction is, indeed, unexceptionable; but that result would seem to be not, as the court holds, a conclusion of law but a conclusion of fact.

LARCENY OF A BUILDING. — From its very nature, larceny of a building must be a rare occurrence. Yet this is what was attempted by the defendant in *Regina v. Richards*, noted in the Law Journal, Jan. 14, 1899. Richards tore down an unoccupied building and removed it without the owner's knowledge. He was charged with stealing a house, but larceny of real estate having no place in the common law, the court were compelled to proceed against him under a statute to secure his conviction. Apparently the tearing down and the carrying away were one transaction; if so, the decision and its reason are clearly correct. The house remained realty until it was pulled down, when its materials became chattels. As such they immediately passed into the wrongdoer's dominion; and before their severance it is clear that the owner never had possession of them as personalty. Unless, therefore, between the conversion into personalty and the act of taking away there was an interval during which the chattels passed into the dominion of their owner, there could be no larceny.

What is sufficient to make these two acts distinct and vest the possession where it rightfully belongs may well be a matter of doubt from the cases. Where the wrongdoer has left the chattels in a ditch on the owner's land and returned for them several hours later, never having intended to relinquish his control, it has been held that no larceny was made out. *Regina v. Townley*, 12 Cox C. C. 59. Where three days elapsed between the severance and the taking, the defendant was convicted, in spite of the continuance of his felonious state of mind, on the grounds that his control ceased with his physical abandonment, and that continuity of intention is not equivalent to continuity of possession. *Regina v. Foley*, 26 L. R. Ir. 299. This case, moreover, was not supposed to overrule *Regina v. Townley*, *supra*, and *Regina v. Petch*, 14 Cox C. C. 116. It is clear that no one can divest himself of possession of a

chattel without intending so to do. And this intention to abandon, shown by evidence, is what is material, and not mere absence of intention to remain in possession. Had the trespasser carried the chattels to some house and left them there, he would clearly not be guilty if he took them away a few days later. The mere fact, then, that the wrongdoer chose as his place of deposit the owner's own premises must be far from conclusive of the latter's possession. Continuity of intention is clearly in such a case continuity of possession. In the absence of evidence of his intention to abandon, Richards, in the present case, should not have been convicted of stealing even if he had postponed for several days the removal of the fruits of his wrong. And had the facts so appeared, an upper court might have had the opportunity of clearing up this curious antinomy in the law of larceny.

GIFTS OF NON-NEGOTIABLE INSTRUMENTS. — Sixty years ago the case of *Edwards v. Jones*, 1 Myl. & Cr. 226, decided, in effect, that one who gave to another a non-negotiable instrument, such as a bond, though a power of attorney to the donee were written upon it, had the legal right to release the obligation represented by the instrument, or to revoke the power of attorney, and that that power was necessarily revoked by his death. The question was treated as an equitable one, in some way connected with gratuitous declarations of trust and the various phases of *Ex parte Pye*, 18 Ves. 140. The case has been supposed to represent the English law to-day. It seems, however, that according to the better view the power of attorney granted would enable the donee to sue on the instrument at law in the name of the donor, that, being written on and inseparable from the document, it was really a power incident to the greater thing, — the document, — so a power coupled with an interest, and so irrevocable. It is true the donor might at any time release the obligation and that release would make the power of attorney valueless, not by revoking it but by annihilating it. The act of releasing would be a direct infringement of the legal right of the donee, a tort; a court of equity might well restrain the donor from committing it, or, if he had committed it, might force him to hold the proceeds of his wrong for the donee. This result, so eminently desirable, has almost always been reached in the American cases, — they have considered the transaction as an "equitable assignment" which is in no way revocable. Most inconsistently, the English courts have come to a like conclusion in regard to such a gift if delivered as a *donatio mortis causa*. Ames, cases on Trusts, page 139 note, page 145 note.

The problem has been raised again in England by the recent case *Re Griffin*, 79 L. T. Rep. 442. A testator gave to his son a non-negotiable banker's receipt, — in effect a certificate of deposit, — indorsed "pay to my son" and signed. After his death the son, who was also his executor, received the deposit from the bank on his own account on presentation of the receipt. A bill was then filed against him by those entitled to the property of the testator for the amount of the deposit. According to the doctrine of *Edwards v. Jones* the power was revocable, and, as in the case of *Edwards v. Jones*, was revoked by the donor's death. After the death, then, the son held a receipt which he could not be compelled to give up but could not sue upon; the estate of the testator still held the obligation from the bank with power to release it, but

without the receipt could not enforce it. The bank might pay either but need pay neither,—a complete deadlock. In the principal case the bank did in fact break that deadlock by paying to the donee, so that even according to *Edwards v. Jones* the bill must have been dismissed; but the opinion, by Mr. Justice Byrne, departed radically from the doctrine of that case. He decided that the delivery of the instrument, with the power of attorney upon it, was a final and complete assignment of the obligation because the power of attorney was not in the nature of a power revocable by death, and because, even if that were not sound, the appointment of the donee as executor confirmed the gift. It is difficult to see the *rationale* of the second ground, why what was not a gift should become a gift because of a subsequent irrelevant appointment, but the first ground is clearly inconsistent with *Edwards v. Jones*. That case, it is true, is not referred to, but *Fortescue v. Barnett* 3 Myl. & K. 36, which it is supposed to have overruled, and *Re Patrick*, [1891] 1 Ch. 82, which seemed willing to differ with it, are vaguely approved. The whole expression of the opinion is tentative, not perhaps always clearly perceived, but it is by far the most satisfactory decision in the English law on the subject.

THE PUBLIC PURPOSES WHICH JUSTIFY TAXATION.—The line between lawful taxation and unconstitutional robbery is not over clear. Whether a collection under guise of a tax is one or the other depends on whether the sum is raised for a public purpose, and what constitutes a public purpose the conflicting authorities make it hard to say. That, in the first instance it is the legislature's duty to judge whether the purpose is public no one doubts. That the courts should overrule this expression of judgment only in cases of clear mistake is equally settled. Where the expenditure will benefit the public directly if at all the taxes are held valid, unless it appears to the courts that the legislature could not reasonably have considered the object public. Where, on the other hand, the immediate effect of the outlay is individual advantage, though great public benefit is sure to result indirectly, the courts are less scrupulous in giving weight to the legislative judgment.

In 1873, the case of *Lowell et al. v. Boston*, 111 Mass. 454, held that a tax could not be raised to help the sufferers rebuild after the great fire, though the loans would have resulted in benefit to the whole State. This case is the foundation of a rule which has been laid down by many courts, that, however great the ultimate public good, if the outlay is in the first instance for individual benefit the purpose is not public and will not justify taxation.

A recent decision approving the rule throws light on its character and on the way it is enforced. *Deering & Co. v. Peterson*, 77 N. W. Rep. 568, decided by the Minnesota Supreme Court. Here the legislature authorized loans to farmers whose crops had been destroyed by storms, with the purpose of enabling them to buy seed grain for the coming season. A commission was to hear applications and give aid in their discretion, but no one owning more than 160 acres of unincumbered land could have relief. The case might have gone on another ground, but the court held the act unconstitutional, because the purpose was private, and they cite *Lowell v. Boston* to sustain this position. In the next breath, however, they say that were the case like *State v. Nelson County*, 1 No. Dak. 88,—were the grain loans necessary to keep great numbers of citizens from be-

coming paupers, — the loans might be justified. Though the court dispute it, the public benefit is as indirect here as in the principal case, and the rule logically enforced would seem to require holding the act bad in both instances. The truth seems that no courts are wholly logical in enforcing the rule. Most courts allow bounties for enlistments, and pensions too, though the benefit is direct to the individual. The same courts both allow corporations to take land by eminent domain on the ground that the establishment of great manufacturing industries is a public purpose, *Jordan v. Woodward*, 40 Me. 317; *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467; and, also, hold that the establishment of these same industries cannot be assisted by public loans, because the object is not a public purpose. *Allen v. Inhabitants of Jay*, 60 Me. 120. Considering these conflicting holdings it would seem that the rule, so far as it goes, is a mere instrument for the transfer of legislative power to the courts. That whereas previously the legislative judgment that the object was public was presumed correct till the contrary was shown "beyond a reasonable doubt," now, by this rule, this judgment is presumed mistaken till the courts are persuaded of the necessity. The rule has many limitations. See 5 HARVARD LAW REVIEW, 30. It is probably more of an excuse than a reason seriously relied on. But it is worthy of notice as an indication of that judicial encroachment which some say bids fair eventually to change our whole system of government.

EVIDENCE OF CHARACTER. — With a view to clemency, evidence of the character of a party to the litigation is admissible in criminal cases within certain limits. The privilege is not open to the prosecution until the accused raises the question; and the proof is also confined to evidence of the general reputation of the person whose qualities are under discussion. In those civil suits, such as libel and slander, in which character, by a rule of substantive law, becomes a material fact in the case, it may, of course be duly proved, there being no question of the law of evidence. In cases of negligence, however, and in other civil suits, proof of character as a ground for inference to conduct stands on a different footing. In *Missouri K. & T. Ry. Co. v. Johnson*, 38 S. W. Rep. 568, the plaintiff, an engineer of the defendant company, brought action for injuries received in a collision. The company claimed that he disregarded signals and was asleep at his post. The engineer, backed by the testimony of his fireman, insisted that he was engaged in other duties and was unable to be on the lookout. In rebuttal the defendant offered to prove that the plaintiff was in the habit of going to sleep while running his engine. This evidence, excluded below, was held inadmissible by the Supreme Court of Texas, who said that the fact that such a habit existed was without sufficient probative force to affect the determination of the question.

The result reached is clearly correct and follows the great weight of authority. *Southern Kansas Ry. Co. v. Robbins*, 43 Kan. 145. The court, however, do not find the true basis for the rejection of such evidence. As a matter of such reason such habits of carelessness on the one hand or of diligence on the other may be of distinct probative value. Still they are unacceptable as tending to prejudice the man in the minds of that peculiar tribunal, the jury, which affects so widely the law of evidence. The dangerous character of this medium of proof outweighs

its demonstrative value. Thayer, Preliminary Treatise on Evidence, p. 525.

It is to be noticed that there is a class of decisions much like the present in which there is a distinct conflict of authority. Where, unlike the principal case, there is no eyewitness to the accident, some courts allow the admission of past habits as sole proof of care or of negligence, as the case may be. *Chicago, R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113. But there is on principle no distinction between this class of cases and those of which the present is an example. Such evidence should be always excluded. And the attitude of some courts in thus disregarding the true nature of the tribunal to which this proof is offered can only be explained by a desire to prevent hardship. Such decisions, then, as *Chicago, R. I. & P. Ry. Co. v. Clark*, *supra*, afford small reason for doubting the soundness of the result reached in the principal case.

IMPOSSIBILITY AS A DEFENCE. — That land taken by compulsory process is freed from restrictive covenants when their performance becomes impossible, is ruled in a recent English case. *Anderson v. Manchester, S. & L. R. R.*, 52 Solicitors' Journal, 396. A railway company were authorized by statute to take certain premises. A part of this land was then held under a lease with a covenant for quiet enjoyment. The lessor conveyed the reversion to the railway company. The railway company afterward used the property in a way that would clearly have made them liable to the lessee upon the covenant had they been ordinary assignees. But the Divisional Court held that this assignment was compulsory and that the covenant did not run with the land against the company, since that covenant only contemplated voluntary assignees. To enforce it in the face of the statute, the court say, would be to enforce an impossibility.

A man may bind himself by an absolute contract to perform at all events or to do the impossible. But there is an accepted doctrine in qualification. Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the parties when the contract was made, a party will not be held liable by mere absolute words which, though large enough to include the contingency, were not used in view of it. *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Harrison v. Manchester*, [1891] 1 Q. B. D. 680. So confident are the courts of their rule and of their reason that they now assert that these provisions against various impossibilities are conditions of the original promise — that to enforce them is simply to enforce the actual contract which the parties have made. *Howell v. Coupland*, L. R. 1 Q. B. D. 258; *Chicago, M. & St. P. R. R. v. Hoyt*, 149 U. S. 1.

But is it not an absurdity to make the test the contemplation of the parties — a question of fact — when it is notorious that the parties have none of these contingencies in mind? Parties in contracting commonly contemplate performance, not breach. Now the accepted statement, it is seen, looks to a solution of the problem upon legal grounds by this interpolation of a fictitious condition. The result reached is just; but is the method justifiable? Where one is under a legal obligation he must usually perform to the letter. Such was the rule anciently: fraud, illegality, duress, and the like did not excuse at law. 9 HARVARD LAW REVIEW, 49. So it was once of impossibility. Y. B. 22 Edw. IV. pl. 26.

Again, the defence of impossibility is seen to avail not only where there is an "absolute impossibility," but often, as in the principal case, where it would be unconscionable by reason of "relative impossibility" to enforce the obligation. The very word "impossibility" seems a misnomer. Relief of this kind is more characteristic of the ethical attitude of equity than of the unmoral attitude of law. Moreover, the course of pleading furnishes a clue. If the accepted statement that the promise is conditioned be true, an obligor charged with an absolute promise should plead negatively; but impossibility is always an affirmative defence. This, again, betrays an equitable origin. To look at the principal case from this point of view, the covenant for quiet enjoyment is absolute, and it runs to the railway company as assignee. But it is against conscience to hold the lessors to their legal liability when the breach is authorized by an act of Parliament. The defence is conclusive, but it is not based upon the legal fiction of an implied condition. It is rather an affirmative defence equitable in origin.

THE JURISDICTION OF EQUITY OVER CRIMES. — In view of the state of American decisions on the subject, it may be with bad grace that we can criticise an English case enjoining the commission of a criminal offence. No English court has ever gone to the length of *United States v. Debs*, 64 Fed. Rep. 724, in which case at the suit of the United States an injunction was granted and addressed to some persons who had not even been joined as defendants in the suit, restraining them from flagrant breaches of the peace. Yet the final decree of the Court of Appeal in the case of *Lyons v. Wilkins*, noted in the Law Times, Dec. 24, 1898, is not free from doubt. The defendants' offence was conspiracy; striking members of a Trade Union picketed the plaintiff's works in order to impede his business. Upon the motion for an interlocutory injunction the chief argument was on the question whether the defendants' acts were criminal under the Property Act, 38 & 39 Vict. c. 86, and the injunction granted was in its wording aimed at the statutory offence. [1896] 1 Ch. 811. Mr. Jenkins, Q. C., suggested that this was not the proper attitude for a court of equity, but his objection left no impress upon the form of the decree. At the hearing of the cause Mr. Justice Byrne does not seem to have been entirely clear upon the matter. 48 L. T. Rep. 618. He delayed his decision until after the decision of the civil action of *Allen v. Flood*, [1898] App. Cas. 1, and modified his decree somewhat in accordance with that case; in this he seemed to be regarding only the common-law tort. But he made another alteration in the decree forbidding the defendants from besetting the premises of one of the plaintiff's employees "for any purpose except merely to obtain or communicate information;" this change he made to fit the words to the phrasing of the Property Act, and in making it he must have been thinking solely of the statutory offence. Finally the decree of the Court of Appeals is apparently framed with equal care in conformity with the statute. The result can hardly be thought satisfactory, for in theory the court of equity should not have looked at the statute at all. *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401. Although equity does not lose jurisdiction over a tort, when that tort happens to be a crime, its jurisdiction is not because of, but in spite of, the criminality of the act. A public nuisance causing special damage, or perhaps a libel, may be enjoined. The reason is that the act, besides

being a crime, is a tort, for which a civil action for damages would lie. No such civil action can lie for breaking a statute, unless the statute itself creates a civil liability, and that was not the fact in the principal case. No more should equity have taken control except for the civil wrong. The statute merely created a right in the public, and only the Attorney-General should take advantage of it, — and that in a criminal proceeding. The business of the court of equity is not the enforcement of the penal code, unless the legislature which created the crime gave the court the power to control it by injunction. Such a course is taken in some of our States, although it puts a severe strain upon the machinery of courts; but the course was not taken by Parliament in the statute in question, and equity should have looked only at the tort. A tort there undoubtedly was; and upon that the injunction should have been based.

RECENT CASES.

AGENCY — INSURANCE POLICIES — WAIVER OF CONDITIONS. — *Held*, that an agent of a life insurance company has power, before delivery, to waive a condition that the policy shall be void unless the first premium is paid during the lifetime of the insured, notwithstanding the policy expressly states that he has no such power. *John Hancock Mut. Life Ins. Co. v. Schlink*, 51 N. E. Rep. 795 (Ill.).

The case is in accord with the great weight of authority. It is generally held that a life insurance agent can, before delivery of the policy, waive any of the conditions therein contained, although there is an express statement in the policy that he has no such power, provided, of course, that the insured has no knowledge of this limitation. *Dilleber v. Knickerbocker Life Ins. Co.*, 76 N. Y. 567; *Piedmont and Arlington Life Ins. Co. v. Young*, 58 Ala. 476. This, however, is merely a question as to the extent of the incidental powers of the agent, and in all cases the jury should decide whether a reasonable man knowing nothing of this express limitation would say it was within the scope of the agent's authority to waive the particular condition. If in such a case, the agent waives or varies the terms of the policy after delivery, contrary to the express stipulations therein contained, the company will not be bound, as the insured will be presumed to know that the agent is not authorized to make such a change. *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356.

BANKRUPTCY — VOLUNTARY ASSIGNMENTS VOIDABLE BY TRUSTEE. — A debtor within four months of being adjudged a bankrupt made a voluntary assignment in conformity with the laws of his state. *Held*, that the assignment is voidable by the trustee in bankruptcy. *In re Gutwillig*, 90 Fed. Rep. 475 (Dist. Ct., N. Y.).

In the case of *Mfg. Co. v. Hamilton*, 51 N. E. Rep. 539 (Mass.), which was followed in *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651, it was held that state insolvent laws were suspended by the National Bankruptcy Act. But since general assignments are not made under insolvent laws that principle does not determine the present case. However, a result different from the one reached would be subversive of the whole purpose and policy of bankruptcy legislation, since it would permit a debtor to distribute his assets in a manner other than that provided by the Bankruptcy Act. Another conclusive reason given for the decision is that the provision of the Bankruptcy Act, which makes voluntary assignments acts of bankruptcy, would be of no value to creditors, if the assignment were not voidable. A similar decision under the preceding act, and an abundant collection of authorities is to be found in the case of *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 B. R. 311.

BILLS AND NOTES — FRAUD BY DRAWER — PAYEE'S LIABILITY TO DRAWER. — Action brought by the drawee against the payee of a bill of exchange to recover back money paid to the defendant's collecting agent, on the ground of fraud perpetrated by the drawer on the plaintiff. The delivery by the drawer to the payee was for collection only. *Held*, that the defendants must be treated as if they were the actual purchasers of the bill, and although in no way parties to the drawer's fraud, they were liable to the plaintiff for money paid to their agent under a mistake of fact. *Eufaula Grocery Co. v. Missouri National Bank*, 24 So. Rep. 390 (Ala.).

The ground of the decision in this case is distinctly opposed to the well settled principle in the law of bills and notes that the rights of a *bona fide* holder for value cannot be affected by equities existing between the original obligor and obligee. *Cf. Arpin v. Owens*, 140 Mass. 145; *Goetz v. Bank of Kansas City*, 119 U. S. 551. A recovery in this suit on any ground is objectionable, in that it leaves the payee still exposed to the drawer's claim for an account of the bill deposited for collection. A suit in equity would work a more satisfactory adjustment of the various rights affected. The legal claim of the above defendants against their collecting agents for the proceeds of the bill was exercisable by them only for the benefit of the drawer. The drawer, however, was guilty of a fraud upon the plaintiff and so held for his benefit, as a constructive trustee, the product of his wrong, namely, an equitable claim against the above defendants. The plaintiff was thus entitled as a *cestui que trust* to reap the benefit of these various claims, by joining the drawer, the above defendants and their collecting agent, as parties defendant to a suit, in which the final decree would be a binding adjustment of the rights of all the parties involved.

CARRIERS—LIABILITY FOR ASSAULT BY EMPLOYÉ.—*Held*, that a carrier of passengers is liable for an assault upon a passenger by one of its employés, though the employé was not acting within the scope of his employment. *Haver v. Central R. R. Co.*, 41 Atl. Rep. 916 (C. A., N. J.).

The decision has the support of the great weight of American authority. Elliott, *Railroads*, 2578. The English courts apply to common carriers the rule of agency that a master is liable for the acts of his servant only when acting within the scope of his employment. *Walker v. South-Eastern Ry. Co.*, L. R. 5 C. P. 640. But reasons of policy seem to require that carriers be held to a greater liability for the acts of their servants than masters in general. The law imposes upon the carrier the duty of protecting the passenger, as far as possible, from injury, and there is a breach of that duty whether the passenger is injured by an employé or by a stranger. The complaint of the passenger in this class of cases is based upon the failure of the employé to protect him, and it may be said with accuracy that the carrier is liable for the inaction, rather than for the action of his servant.

CARRIERS—STAMP ACT—REGULATION OF CHARGES.—By Act of Congress express companies are required at every shipment of goods to issue a bill of lading with a one cent revenue stamp attached. *Held*, that a uniform increase of one cent in all express rates, regardless of the bulk of goods or the distance to be carried, is an unreasonable regulation of charges, being an attempt to shift upon the shipper a burden imposed by law upon the carrier. *Attorney-General v. American Express Co.*, 77 N. W. Rep. 317 (Mich.).

The Stamp Act contains no provision which expressly or impliedly prohibits an express company, which has paid the tax as specified, from reimbursing itself by an additional charge to the shipper. The carrier has a right to receive for its services a reasonable compensation, the amount of which may be determined by long usage. Hutchinson, *Carriers*, 2d ed., § 447. If, then, the rates in force before the passage of the Stamp Act were not unreasonable, it is hard to see how they can be adjudged unreasonable after the Act is in force, by reason of an increase in amount which is only commensurate with the additional expense inflicted by Congress on the conduct of the carrier's business. The doctrine of the principal case, which seems really to involve a forced construction of the Stamp Act, would have worked a deplorable result, had the amount of the tax been large enough to make a material diminution in the carrier's profits. See, *contra* to principal case, *Crawford v. Hubbell*, 89 Fed. Rep. 961 (Cir. Ct. N. Y.).

CHATTEL MORTGAGES—UNCERTAINTY IN DESCRIPTION.—An owner mortgaged fifty cows, part of a larger herd, without designating the particular animals. *Held*, that the mortgage conferred on the mortgagee the right to select the number from the herd, and was a writing, "intended to operate as a lien," within Rev. St. [1895], art. 3328. *Amory v. Popper*, 48 S. W. Rep. 572 (Tex., Sup. Ct.).

That a mortgage of a stated number of chattels out of a larger sum total, without special identification or description, is void as to third parties, may be regarded as settled law. *Parker v. Chase*, 62 Vt. 206; *Jones, Ch. Mort.*, 4th ed., § 56. As to the exact nature of the relation created between the parties to such an instrument there seems to have been little discussion. It is clear that the mortgagee acquires no title to nor lien on particular chattels. The principal case regards him as having a power to select the property, on the ground that the instrument is to be construed most strictly against the mortgagor, and the result thus reached is as satisfactory as any. The same view seems to have been taken in *Call v. Gray*, 37 N. H. 428, and in *Gurley v. Davis*, 39 Ark. 394. It is, however, a wide stretch of the term lien to make it include such a power as this, and on that point the principal case can hardly be supported.

CONSTITUTIONAL LAW — EMINENT DOMAIN — JUST COMPENSATION.— *Held*, that when part of one's land is condemned for highway purposes, it is not unconstitutional to provide that the commissioners in fixing the compensation shall take into consideration the special benefits to the rest of his land from the improvement. *Randolph v. Board of Chosen Freeholders*, 41 Atl. Rep. 960 (N. J., Sup. Ct.).

In *Loweree v. City of Newark*, 38 N. J. Law, 151, it was held constitutional to provide that a special assessment for benefits arising from the opening of a street should be set off against any award for land taken. On the ground that it practically provided for such a set-off a statute like that in the principal case was supported in *Newby v. Platte County*, 25 Mo. 258. *Mangles v. Chosen Freeholders*, 55 N. J. Law, 88, sustained a similar statute without any resort to the taxing power, and the present case approves this conclusion. The reasoning is that the constitution simply requires just compensation to be paid when property is taken for public purposes, and that the courts cannot say that an owner has not been justly compensated if paid the difference between the value of his land before and after the taking of a part. This reasoning seems entirely sound, but many courts, probably a majority, would hold that the value of the land actually taken must be paid anyway, special benefits being considered only in estimating damage to other land not taken. *Wagner v. Gage County*, 3 Neb. 237.

CONSTITUTIONAL LAW — EMINENT DOMAIN — LEASE.— A tenant from year to year held over with the landlord's consent after the termination of a year, although prior thereto the State had commenced proceedings to condemn the land. Thereafter the land was condemned and the tenant claimed compensation. *Held*, that the tenant was not entitled to hold over as against the State, and therefore he cannot have compensation. *In re State House*, 41 Atl. Rep. 1004 (R. I.).

In accord is *Schreiber v. Chicago & Evanston R. R. Co.*, 115 Ill. 340. It is well settled that a lessee for a term of years is entitled to compensation for a taking of the property leased. *Storm Lake v. Iowa Falls, etc. Ry. Co.*, 62 Iowa, 218. And so a lessee under a parol lease from year to year. *Getz v. Philadelphia & Reading R. R. Co.*, 105 Pa. St. 547. In the principal case therefore the tenant would have been given compensation had he acquired a right to hold for another year before condemnation proceedings were begun. However, the commencement of the proceedings prior to the termination of the year for which the tenant rightfully held was notice of the intended exercise of the paramount right of the State to both landlord and tenant. Therefore a renewal of the lease by the mutual consent of the landlord and tenant should be taken to be made with regard to the pending proceedings instituted by the State, and as terminable when the land should be finally condemned.

CONSTITUTIONAL LAW — TAXATION.— A statute authorized State loans to persons whose crops had failed the preceding year of the money needed to buy seed grain. In an action by a county to recover the amount of such a loan from the borrower, *held*, that the statute is unconstitutional. *Deering & Co. v. Peterson*, 77 N. W. Rep. 568 (Minn.). See NOTES.

CONSTITUTIONAL LAW — UNREASONABLE SEARCHES AND SEIZURES.— An Illinois statute provided for the issue of a search warrant upon the affidavit of a manufacturer of beverages that he has reason to believe and does believe that a person, in violation of the act, is using or has used any of complainant's bottles, casks, etc. *Held*, that the statute is in conflict with that section of the Illinois Constitution which prohibits the issue of search warrants except upon probable cause supported by affidavit. *Lippman v. People*, 51 N. E. Rep. 872 (Ill.).

Where a statute requires a showing of probable cause, it is well settled that the act is not satisfied by a mere expression of deponent's belief unaccompanied by a declaration of the facts on which that belief is founded. *Stuart v. Kimball*, 43 Mich. 443, 451. The law is the same where the requirement is found in a constitution, but where no statute has sanctioned such opinion evidence. *Johnston v. United States*, 87 Fed. Rep. 187. In no former case, however, has a legislative enactment been held unconstitutional because declaring an expression of belief to be equivalent to proof of probable cause. But, although the authorities cited are perhaps not precisely in point, the present decision seems clearly correct on principle. To hold otherwise would conflict with common-law notions as to the value of hearsay and opinion evidence, and would deprive the constitutional guaranty of much of its usefulness. The court further declared the statute in question objectionable as authorizing a search warrant for merely private ends. *Robinson v. Richardson*, 3 Gray, 454. But surely the protection of property and the enforcement of a criminal statute passed for that purpose should be deemed a public object.

CONSTRUCTIVE TRUSTS.— Certain cattle mortgaged to the defendant were destroyed by a tort of a third party. The defendant, on a judgment against the tort-feasor

recovered a sum of money equivalent to his mortgage debt, and in exchange for the balance of the judgment received certain judgments which the tort-feasor held against the mortgagor. *Held*, that the plaintiff, the mortgagor, may, at his election, take the judgments against himself received by the defendant, or charge the defendant with the uncollected balance on the judgment against the tort-feasor. *Woodrum v. Washington National Bank*, 55 Pac. Rep. 333 (Kan., Sup. Ct.). See NOTES.

CONTRACTS — CONDITIONS — SATISFACTION OF THE PROMISOR. — The defendant employed the plaintiff to paint a pastel portrait, the contract providing that if the portrait were not satisfactory the defendant should not pay. The plaintiff then painted a portrait which the defendant rejected upon the ground that it was not satisfactory to him. *Held*, that the plaintiff has no cause of action. *Pennington v. Howland*, 41 Atl. Rep. 891 (R. I.). See NOTES.

CONTRACTS — CONSIDERATION. — The defendant gave the plaintiff his non-negotiable note as a gift without any consideration, and the plaintiff, in reliance on the note, gave up a lucrative employment. *Held*, that the defendant is estopped to set up lack of consideration. *Ricketts v. Scotchman*, 77 N. W. Rep. 365 (Neb.).

It is hard to find any estoppel here, since the maker of the note never represented that there was any consideration for it. Moreover, the representation to raise an estoppel must be as to an existing fact, and not in the nature of a promise. *White v. Ashton*, 51 N. Y. 280; *Insurance Co. v. Mowry*, 96 U. S. 544; *Jordan v. Money*, 5 H. L. Cas. 185. Yet there are many decisions to the effect that where a note is given to a college or charitable institution, and the institution expends money in consequence, the donor cannot set up lack of consideration as a defence on the note. *Church v. Garvey*, 53 Ill. 401; *Irwin v. Lombard Univ.*, 56 Ohio St. 9. But if the donee has not changed its position, the note is unenforceable. *Simpson College v. Tuttle*, 71 Iowa, 596; *Reimsnyder v. Gans*, 110 Pa. St. 17; *Miller v. Western College*, 52 N. E. Rep. 432 (Ill.). This must be regarded as an innovation, and it is doubtful if it has ever before been extended to a gift to a private individual. The whole doctrine is repudiated in some states. *Methodist Church v. Kendall*, 121 Mass. 528.

CONTRACTS — STATUTE OF FRAUDS — CONSTRUCTIVE TRUSTS. — In consideration of the conveyance of certain land by the deceased to her mother, her father, for himself and the mother, orally promised to transfer their rights in certain other land to the deceased's husband. The conveyance to the mother was made, but the parents later refused to perform their part. In a suit in equity by the husband to which the heirs of deceased were made parties, *held*, that if the parents do not carry out their agreement the land conveyed to the mother will revert to the estate. *Simons v. Bedell*, 55 Pac. Rep. 3 (Cal., Sup. Ct.).

The mother cannot be compelled to carry out the agreement, because it was not in writing; but if she refuses, the court correctly decide there should be a constructive trust for the heirs of grantor of the land received. It is inequitable for her to retain the consideration while refusing to carry out the contract. In England, where one has given a promise within the Statute of Frauds in return for the receipt of land or chattels, he will be compelled to give back that which he has received if he refuses to carry out the agreement. *Haigh v. Kaye*, 7 Ch. App. 469. In this country, generally, where land is so conveyed the courts will not compel a reconveyance, *Stevenson v. Chapnell*, 144 Ill. 19; but, where the point has come up, the grantor is allowed to rescind the contract and to recover the value of the land conveyed in an action for land sold. *Smith v. Hatch*, 46 N. H., 146. This is an anomalous doctrine, and the principal case, which is in accord with the English rule, seems to state the correct view. The Statute of Frauds is not violated, but equity thus prevents it from being used as an instrument of fraud. Even in the United States one is allowed to recover money paid, in return for a parol agreement for the conveyance of land, and to sue in trover for chattels given under a like arrangement. The principle should be the same where land is given for the promise. *Allen v. Booker*, 1 Stewart, 21; *Keith v. Putton*, 1 A. K. Marshall, 23.

CORPORATIONS — CONTRACTS. — The plaintiffs contracted with a number of persons who intended to form a corporation to build a factory for it. The factory was built and the corporation was formed and used the factory. *Held*, that it is liable on the contract. *Chicago Building Co. v. Creamery Co.*, 31 S. E. Rep. 809 (Ga.).

In general a corporation is not liable on the personal contracts of its promoters. *Western Screw Co. v. Cousley*, 72 Ill. 531. But when it has enjoyed the benefits of such contracts, it is generally held liable on them. This is sometimes put on the ground of ratification. *Whitney v. Wyman*, 101 U. S. 392; *Oakes v. Water Co.*, 143 N. Y. 430. This reasoning seems erroneous, for to have a ratification the principal for whom the agent claimed to act must have been in existence at the time the contract was made.

Kelner v. Baxter, 2 C. P. 174; *Abbott v. Hapgood*, 150 Mass. 248. The true ground for these decisions seems to be that the court will imply a novation from the acts of the parties, when the corporation has accepted the benefits of the contract, or has recognized it in its articles of association. *Howard v. Ivory Co.*, 38 Ch. D. 156; *McArthur v. Printing Co.*, 48 Minn. 319.

CRIMINAL LAW — CORPORATIONS — CONTEMPT OF COURT. — A newspaper, in the course of an article concerning a pending trial, published a statement of certain facts which could not have been shown in evidence at that trial. *Held*, that this tended improperly to influence the jury and was therefore a contempt of court. *Telegram Newspaper Co. v. Commonwealth*, 52 N. E. Rep. 445 (Mass.). See NOTES, 12 HARV. LAW REV. 427.

CRIMINAL LAW — EMBEZZLEMENT — JURISDICTION. — Defendant entered into a contract with X. in Polk county, whereby he agreed to sell goods in other counties in the state, and send the proceeds to X. Goods were shipped to various places in the state, where they were converted by the defendant, who refused to account for the proceeds upon his return to Polk county. *Held*, that the venue was properly laid in Polk county. *State v. Hengen*, 77 N. W. Rep. 453 (Iowa).

To give a county court in Iowa jurisdiction of a crime it is necessary, under the Iowa code, that some act which is an essential element of the offence should have been committed in the county. The court held that the refusal of the defendant to make an accounting in Polk county was a necessary ingredient of the embezzlement. But embezzlement by a bailee consists only of a conversion *animo furandi* of property of the bailor. McLain's An. Code of Iowa, § 5215. If the defendant had been a trustee it might well have been argued that there was no embezzlement until there was an obligation to account. In the principal case, however, the conversion concededly occurred outside of Polk county. Where venue is confined to the place of the commission of an offence, as in Iowa, it is frequently difficult to determine the jurisdiction of a crime, but it is better to leave the remedy for such a condition to the legislature than to consider as part of the offence facts which have nothing to do with it. *People v. Murphy*, 51 Cal. 376.

EVIDENCE — CHARACTER — CIVIL SUIT. — In an action by an engineer for damage resulting from a collision the company showed that he disregarded signals. They claimed that was asleep at his post, while the fireman testified that he was doing his duty. *Held*, that evidence that on former occasions he had slept while running his engine is inadmissible to prove negligence on his part. *Missouri K. & T. Ry. Co. v. Johnson*, 48 S. W. Rep. 568 (Tex., Sup. Ct.). See NOTES.

EVIDENCE — MENTAL ATTITUDE — SIMILAR ACT SHOWING SCHEME. — On the trial of an indictment for obtaining eggs by false pretences, it was proved that the prisoner had falsely represented by newspaper advertisements that he was carrying on *bona fide* a dairyman's business. *Held*, that evidence that, on two occasions within two months after the transaction in question, the prisoner had fraudulently obtained eggs from other persons by means of similar advertisements, is admissible to show a scheme to defraud. *The Queen v. Rhodes*, [1899] 1 Q. B. D. 77.

It is a well established rule of evidence that in the trial of criminal cases involving the proof of a special mental condition, such as a felonious intent or guilty knowledge, evidence of similar acts committed by the prisoner is admissible; that is, if they are near enough in point of time and frequent enough in number to raise a legitimate inference that the offence charged was not the result of a mere accident or mistake, but was rather an act in a premeditated line of conduct. *Reg. v. Francis*, 12 Cox, C. C. 612; *Commonwealth v. Coe*, 115 Mass. 481, 501. The principal case is interesting as being very near the line where such an inference would be of too slight weight to be of probative value. The decision seems a sensible one, however, it being proper to admit the evidence and leave to the jury the determination of what weight, if any, shall be accorded to it.

EVIDENCE — PERSONAL INJURIES — EXAMINATION BY DEFENDANT'S SURGEON. — In an action for personal injuries, the plaintiff exhibited her wounds to the jury, but refused to allow the defendant's surgeons to examine them. *Held*, that the defendant was entitled to have the plaintiff examined by experts of his own selection, in order to rebut the testimony of the plaintiff's physicians. *Chicago etc. R. R. Co. v. Langston*, 48 S. W. Rep. 610 (Tex., Civ. App.).

The authorities are in hopeless conflict on this point. Many jurisdictions hold that the right of an individual to have his person free from all restraint or interference is absolute, and to compel him, in a civil suit, to undergo a physical examination is an indignity which the courts will not tolerate. *Stuart v. Havens*, 17 Neb. 211. A number of courts, on the other hand, maintain that when a plaintiff has once exhibited his in-

juries to the court, he has waived his right to object to a physical examination on the ground of personal inviolability. *Haynes v. Town of Trenton*, 123 Mo. 326. Perhaps the most satisfactory rule would be to leave the entire question to the discretion of the court, which would order an examination when the ends of justice imperatively demanded it, and would refuse when it was evident that the purpose of the defendant was merely to harass and annoy the plaintiff. *Belle of Nelson Distilling Co. v. Riggs*, 45 S. W. Rep. (Ky.).

EVIDENCE — PRESUMPTIONS. — On an issue as to the sanity of a testator, the court charged the jury that if the evidence was evenly balanced, they should consider the presumption of sanity as evidence, and find in favor of the will. *Held*, no error. *Appeal of Sturdevant*, 42 Atl. Rep. 70 (Conn.).

It seems impossible to support either the reasoning or the conclusion of the court. While the court admit that the ultimate burden of establishing the sanity of the testator is on the person propounding the will, *Crowninshield v. Crowninshield*, 68 Mass. 524, yet the effect of the charge must be to direct a verdict in favor of the will if the evidence is evenly balanced, although it is evident that in such a case the verdict should be against the party having the burden of establishing sanity. *Sutton v. Sadler*, 3 C. B. N. s. 87. While it is often said that presumptions are evidence, this is incorrect and has led to much confusion. See *Coffin v. U. S.*, 156 U. S. 432; *Allen v. U. S.*, 164 U. S. 492; *Agnew v. U. S.*, 165 U. S. 36. The legitimate effect of the presumption of sanity seems to be merely to make out a *prima facie* case, and to put the burden of coming forward with evidence on the other party. But when all the evidence is brought in, although the fact on which the presumption is based may be evidence, namely, the fact that most men are sane, yet the presumption itself is not evidence, being merely an inference drawn from that fact. Thayer, *Prel. Treat. Evid.*, 551-576.

GIFT OF NON-NEGOTIABLE INSTRUMENTS. — A non-negotiable banker's receipt with a power of attorney indorsed was given by a father to his son, and later the son was appointed his executor. At the father's death the son collected the deposit in his own right. *Held*, that the son may hold the deposit. *Re Griffin*, 79 L. T. Rep. 442. See NOTES.

INSURANCE — FORFEITURE — WAIVER. — An insurance policy provided that in case insurance in excess of a certain sum should be placed on the property insured, the policy should be void. Such an excess sum was placed. After loss, however, the insurance company, although having notice of the breach of the condition, did not claim the forfeiture, but proceeded to determine the loss. In an action on the policy, *held*, that the company is liable. *British-America Assurance Co. v. Bradford*, 55 Pac. Rep. 335 (Kan., Sup. Ct.).

The court held the company liable on the ground that by its acts it had waived the right to claim a forfeiture. There was no consideration nor any acts on which to base an estoppel, and in *Bigelow, Estoppel*, 3d ed., 568, it is said that such a waiver is of no effect; this view is supported by some early cases. *Ripley v. Aetna Insurance Co.*, 30 N. Y. 136. The principal case, however, seems to be correct in holding that neither of these elements is necessary to make a waiver binding. *Titus v. Glens Falls Insurance Co.*, 81 N. Y. 410. A surety may become liable by waiving a defence given him by the fact that his creditor has given time to the principal debtor. *Hooper v. Pike*, 72 N. W. Rep. 829 (Minn.). An indorser of a bill of exchange may in the same way waive the laches of the holder in notifying him of dishonor. *Allen v. Brown*, 124 Mass. 77. Generally where one has a defence he may waive it, and the principal case is but another illustration of this rule.

PARTNERSHIP — SHARING PROFITS AS TEST. — One of the defendants advanced money to the other to be used in a business enterprise, and the latter agreed to return the principal with interest and one-third of the profits of the business. *Held*, that this made them partners as to third parties, although both defendants intended a loan merely, and not a partnership. *Dilley v. Abright*, 48 S. W. Rep. 548 (Tex. Civ. App.).

The decision follows *Cothran v. Marmaduke*, 60 Tex. 370, the force of which was somewhat weakened, however, by *Busard v. Bank*, 67 Tex. 83. The doctrine adopted by the court, making a sharing in the profits, except as payment for services, conclusive evidence of partnership, once prevailed in both England and America. *Grace v. Smith*, 2 W. Bl. 998; *Waugh v. Carver*, 2 H. B. L. 235; *Hao v. Roal*, 16 Hun. 526. It was overthrown in England by *Cox v. Hickman*, 8 H. L. Cas. 268, and cases following it, and has been almost universally abandoned in this country. *Curry v. Fowler*, 87 N. Y. 33; *Le Leone Castagnio*, 5 Colo. 564. The true doctrine is that profit-sharing is only *prima facie* evidence of a partnership, and the real intention of the parties finally governs. 1 Bates, *Partnership*, §§ 15, 23, 47. It may be just that one who loans money for a share of profits should be postponed to other creditors, but the proper way to reach this result is by statute, as is done in England by Bovill's Act,

PROCEDURE — HABEAS CORPUS — APPEAL. — A petitioner for a writ of *habeas corpus* appealed from an order remanding him to imprisonment. *Held*, that the North Dakota statutes do not authorize appeals in *habeas corpus* cases. *Carruth v. Taylor*, 77 N. W. Rep. 617 (N. Dak.).

Whether appellate jurisdiction exists in *habeas corpus* cases has proved a most troublesome question both in England and in the United States. At common law, the weight of authority on both sides of the Atlantic is against the allowance of a writ of error to a decision on *habeas corpus*. *City of London's Case*, 8 Co. 121 b; *Coston v. Coston*, 25 Md. 500. *Contra*, *Yates v. People*, 6 Johns. 337. The right of appeal in actions at law being purely statutory, the question in the principal case was entirely one of interpretation, and the court follows the prevailing doctrine in holding that statutes conferring the right of appeal in general terms do not apply to *habeas corpus* proceedings. *Bell v. State*, 4 Gill, 301. But see *Holmes v. Jennison*, 14 Pet. 540. If appeals were allowed by the petitioner, probably they would have to be allowed against him; and if a decision in his favor were subject to stay pending an appeal, the writ of *habeas corpus* would lose much of its prompt remedial character. In many States the matter is regulated by express statute.

PROPERTY — COVENANT OF TITLE — DAMAGES. — X conveyed an undivided one-half of certain land to plaintiff by warranty deed. The conveyance was by metes and bounds, and purported to pass an interest in 150 acres, though in fact the tract contained but 100 acres. X afterward acquired title to the other one-half, from whom defendant purchased it with notice of X's conveyance to plaintiff. In a suit for partition, *held*, that the tract should be equally divided between plaintiff and defendant. *Doyle v. Brundell*, 41 Atl. Rep. 1007 (Pa.).

The court below held that as X purported to convey a one-half interest in 150 acres by warranty deed, plaintiff should take 75 acres, as defendant, taking with notice, was bound by the equities between plaintiff and X. This view cannot be supported. It would result in giving defendant's land to the plaintiff for a breach of X's covenant of warranty. Where one conveys land to which he has no right he is estopped to deny the grantee's interest, and if the grantor afterward gets title it feeds the estoppel and goes to the grantee. *Christmas v. Oliver*, 10 B. & C. 181. Here, however, the land afterwards acquired did not come within the description of the first deed, so that the plaintiff could get no land on the principle of estoppel. The decision of the upper court is clearly the correct one.

PROPERTY — EQUITABLE MORTGAGES — DEPOSIT OF TITLE DEEDS. — *Held*, that a mere deposit of title deeds as security for a debt does not create an equitable mortgage. *Parker v. Carolina Savings Bank*, 31 S. E. Rep. 678 (S. C.).

It is settled law in England that a deposit of title deeds for the purpose of security without any written memorandum of the transaction, gives rise to an equitable mortgage. *Russel v. Russel*, 1 Bro. C. C. 269. The legal effect of the deposit is a contract that the depositor's interest in the land shall be liable for the debt. *Pryce v. Bury*, 2 Drew. 41. Where deeds are the only muniments of title, and their possession an important factor in determining it, as in England, there is some reason for attributing to a deposit of them the creation of a lien on the land. In the United States, where possession of deeds is of no consequence so far as title is concerned, there is no reason for such a doctrine. Apparently, however, the English rule has been adopted in Wisconsin and New Jersey. *Jarvis v. Dutcher*, 16 Wis. 307; *Gale v. Morris*, 29 N. J. Eq. 222. And until the principal case it had been supposed to be law in South Carolina. *Hutsler v. Phillips*, 26 S. C. 136.

PROPERTY — RELIGIOUS SOCIETIES — CHANGE OF DOCTRINE. — The members of a church, for whose benefit property had been donated in trust, split into two factions owing to a disagreement as to the correct doctrines to be taught. *Held*, that the members who adhere to the doctrines taught at the time of donation are entitled to the property, however small a minority they may be. *Peace v. First Christian Church of McGregor*, 48 S. W. Rep. 534 (Tex., Civ. App.).

The authorities uniformly support the present case, and hold that when property is conveyed to trustees in trust for a particular church, it is dedicated to the principles and doctrines maintained by the church at that time. *App. v. Lutheran Congregation*, 6 Pa. St. 201; *McBride v. Porter*, 17 Iowa, 203. It might be questioned on principle, however, whether when property is conveyed in trust for such a religious corporation without any express conditions as to the doctrines to be taught, it should not go, in case of the congregation splitting into factions, to that part which by its votes is entitled, by the laws of the corporation to control the government of the church. The principal case, however, is, perhaps, more satisfactory in practice, as donors give to churches usually on account of the doctrines there maintained; and any change in such doctrines, if the present case were not law, would result in an application of the property for purposes other than those which the donor would wish.

PROPERTY — WILLS — CONSTRUCTION OF AMBIGUOUS CLAUSE. — A testatrix bequeathed five thousand dollars to A, and devised and bequeathed the residue of her estate to B. In a codicil she declared: "I hereby revoke the bequest made by me to B, and give the five thousand dollars (heretofore in my will bequeathed to said B) to C." *Held*, that the codicil revoked the bequest to A. *Home for Incurables v. Noble*, 19 Sup. Ct. Rep. 226.

The decision, which at first sight appears rather odd, rests upon satisfactory reasoning. A mistake being apparent upon the face of the codicil, the court must construe the revoking clause so as to carry out the intention of the testatrix. An examination of the whole instrument leads to the conclusion that it could not have been the intention to revoke the residuary bequest to B. Hence the word "B" may be stricken out. *2 Williams Executors*, 938. And there is sufficient evidence upon the face of the will to justify the court in concluding that the revoking clause was intended to apply to the bequest to A. In the lower court a contrary decision was based upon the argument that the codicil contained two clauses separate from each other, a revocation free from ambiguity, and a bequest that could be rendered effective by disregarding the parenthetical clause. But a conclusive answer to this view is that it disregards the settled rule of construction that the different clauses of a will should be considered in reference to each other. *Lane v. Vick*, 3 How. 464.

TORTS — REPLEVIN — ATTACHED PROPERTY. — In a suit against a debtor the sheriff attached goods of his which were exempt from attachment. *Held*, that the statute providing that where goods are taken under execution one, other than the defendant, claiming ownership, may replevy them, was remedial, and that this debtor could not replevy, his goods being *in custodia legis*. *Prescott v. Stark*, 41 Atl. 1021 (Vt.).

The common-law rule that goods *in custodia legis* cannot be replevied has been laid down in its broadest extent. *Kittredge v. Holt*, 55 N. H. 621; *Isley v. Stubbs*, 5 Mass. 280. The rule, however, is founded on grounds of public policy; that to allow replevin would only lead to circuitry and deprive the creditor of his security. It is clear that the reasoning does not hold when goods of a third party have been wrongfully seized in execution, and the better view seems to be that at common law such property might be replevied by the true owner. *Winnard v. Foster*, 2 Lutw. 1191; *Rooke's Case*, 5 Coke, 99; *Clark v. Skinner*, 20 Johns. 465. By parity of reasoning the replevy of goods exempt from attachment should be allowed, and such a view has been taken in some cases. *Durch v. Rahner*, 61 Ind. 64; *Frazier v. Syas*, 10 Neb. 115; *Ross v. Hawthorne*, 55 Miss. 551. The whole question has been largely dealt with by statute.

TORTS — WILFUL WRONG — AVOIDABLE CONSEQUENCES. — The plaintiff was wrongfully riding on the footboard of defendant's engine. The engineer wilfully turned steam on him, whereupon he jumped to the next car, but slipped and was injured. *Held*, that since the act of the engineer was a wilful assault, the defendant is liable for the injury, irrespective of whether the plaintiff exercised ordinary care in jumping. *Galveston, etc. Ry. Co. v. Zantsinger*, 48 S. W. Rep. 563 (Tex. Sup. Ct.).

The theory of the decision is that when the defendant's act is intentional and wilful it is the proximate cause, unless the plaintiff is guilty of wilful or gross negligence in failing to avoid the consequences thereof. Where the defendant's act is negligent the plaintiff is under a duty to use ordinary care to avoid the consequences. *Hogle v. New York, etc. R. R. Co.*, 28 Hun, 363. Likewise, where the defendant's act is illegal. *Flower v. Adam*, 2 Taunt. 314. There is a tendency to hold a defendant for more remote consequences when his act is intentional, but to relieve the plaintiff, in such a case, from all duty to exercise ordinary care is inconsistent with the doctrine of avoidable consequences. It seems, therefore, that it should have been left to the jury to determine whether the plaintiff, in what he did, acted reasonably, or whether he was so deprived of his presence of mind as to render his act irresponsible, *Jones v. Boyce*, 1 Stark, 493; *Woolley v. Scovell*, 3 Man. & Ry. 105.

REVIEWS.

STUDIES IN INTERNATIONAL LAW. By Thomas Erskine Holland, D.C.L. Oxford: At the Clarendon Press. London and New York: Henry Froude. 1898. pp. viii, 314.

This volume consists mainly of a number of lectures and addresses delivered by the author during the last twenty-five years. They discuss

a variety of points of international law in a manner which assumes no special knowledge, and which makes them interesting to the general reader as well as to the student. The subjects are roughly grouped under four heads: "The Law of War;" "Illustrations of the System of International Law;" "The Eastern Question;" and "Biographical Sketches." In treating under the first group of "The Brussels Conference of 1874," and "The Progress of the Written Law of War," subjects of especial interest at this time in view of the propositions of the Czar, Professor Holland doubts the possibility at present of any codification of the laws and usages of war, and recommends the promulgation by the various governments of authoritative instructions for the use of their armies, such as those issued by President Lincoln to the armies of the United States, or the Manual of the Institute of International Law, in the hope that these bodies of rules may be assimilated to each other in the future. In "The Bombardment of Open Coast Towns" attention is recalled to the somewhat running controversy which raged in the columns of the "London Times" during several months of 1888 in consequence of the author's criticism of the utter disregard of the rules of international law displayed by the attacking fleet during the British naval manoeuvres of that year. In an interesting discussion of "International Law in the War between Japan and China," which has been translated into Japanese by the order of that government, Japan is shown to have conformed to the laws of war in a manner worthy of the most civilized nations, while the Chinese ideas of the subject were merely rudimentary. The author makes a novel distinction between "pacific blockade" when it is a mere measure of reprisal and when it is instituted for some "high political object, as in case of intervention, or is a measure of self-preservation, such as the suppression of a rebellion." In the former case, the opinion is expressed that the blockade should be directed against the flag of the blockaded State alone, while in the latter third powers may be more fairly called upon to submit to interference with their trade. It may, however, be asserted that there is no rule compelling a power to assent, under the guise of a peaceful proceeding, to the application of a purely belligerent right; and that whenever the blockade is directed against the flag of a third State, such State is entirely justified in assuming that war exists between blockading and blockaded State, and in acting accordingly, as was the attitude of the English government towards the blockade of Formosa by France in 1884.

In the second group of subjects the author takes up "Recent Diplomatic Discussions as Illustrations of the System of International Law," a somewhat misleading title, since this lecture was delivered in 1878,—"The Literature of International Law in 1884," and "International Law and Acts of Parliament." Three of the four articles of the third group belong rather to the history of the Eastern question than to international law proper, and the fourth article, "The International Position of the Suez Canal," would be more satisfactory if Professor Holland had given his opinion upon just what is the international state of the Suez Canal in the face of the officially announced reservation of Great Britain regarding the agreement between the Powers of 1888 for its neutralization. The fourth and last group of subjects consists of appreciative obituary notices of Mountague Bernard, Sir Robert Phillimore, W. E. Hall, and Sir Travers Twiss, read in French before the Institut de Droit International, of which the author is a distinguished member. E. H. S.

THE UNITED STATES INTERNAL REVENUE LAWS. With Notes. By Mark Ash and William Ash. New York: Baker, Voorhis, & Co. 1899. pp. lvi, 631.

The lawyer's work has only begun when he finds the section of the revenue law that governs his case. To ascertain the effect that will be given the provision in the courts is a far more difficult task. The authors have endeavored to collect in this volume everything collectable that can materially assist this investigation. All the revenue laws now in force are printed in full, and the different sections are followed by citations of United States cases on kindred points, and by references to the earlier laws which form the basis of the sections in question. Pains have been taken to collect the English authorities bearing on our statutes, especially those relating to taxes on legacies and stamp taxes on instruments. The cases on both sides of the many disputed points regarding the validity of unstamped papers and their use as evidence have been gathered with particular care and fulness. The most noticeable feature of the work is the exhaustive collection of rulings rendered by the Commissioner of Internal Revenue and other executive officials. These rulings are the practical interpretations rendered in the course of discharging duties under the act. While they are not binding on the courts, they are yet regarded by them with respect, and are, accordingly, worth careful consideration by lawyers. The most recent of these holdings have been particularly sought, and by means of addenda the collection has been made complete to November, 1898. An appendix of sixty pages gives the statutes regarding the jurisdiction of the courts, the duties and responsibilities of revenue collectors, the penalties for offences against the revenue laws, and in general the manner in which the acts will be administered. Throughout the volume the workmanship seems thorough, and the result is a reference book of value.

G. B. H.

ANNOTATED RULES AND FORMS IN BANKRUPTCY. By Wm. Miller Collier. Albany, N. Y.: Matthew Bender. 1899. pp. v, 169.

This book contains the appendices to the last edition of Collier on Bankruptcy published as a distinct volume. Reviewed in 12 HARVARD LAW REVIEW, 228. All of the three documents included are indispensable, but are common property—the Rules in Equity, the Rules in Bankruptcy, and the Official Forms in Bankruptcy. However, there is much editorial labor in the annotations and indices. The editor gives almost exclusive attention to the general orders in Bankruptcy recently established by the Supreme Court. Below each provision of these he adds the sections that apply from the National Bankruptcy Act, from the Rules in Equity, and from the General Orders in Bankruptcy of 1867. Further, he subjoins a citation of the cases in point and a succinct commentary thereon. But upon the whole the editorial work, though of distinct worth in connection with the principal treatise, is of less value apart from it.

B. W.

BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

ANNOTATED RULES IN BANKRUPTCY.
By Wm. Miller Collier. Albany, N. Y.:
Matthew Bender. 1899.

MANILA AND THE PHILIPPINE ISLANDS.
New York: The Philippines Company.
1899.

MORTGAGES AND PLEDGES OF RENTS
AND PROFITS OF REAL ESTATE. By
Henry M. Hoyt. Spokane, Wash., 1898.

THE BANKRUPTCY LAW OF THE UNITED
STATES. By Theodor Aub. Brooklyn-
New York: Eagle Book Printing Dept.
1899.

THE MEDICO-LEGAL ASPECTS OF HYP-
NOTISM. By Sidney Kup. American
Journal of the Medical Sciences. 1898.

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No. 8

TWO THEORIES OF CONSIDERATION.

I. UNILATERAL CONTRACTS.

CONSIDERATION, according to the traditional definition, is either a detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise. Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. The simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient *assumpsit* in its primitive form of an action for damage to a promisee by a deceitful promisor. In one respect only does the definition leave anything to desire. What is to be understood by detriment?

The incurring of a detriment by the promisee involves of necessity a change of position on his part; there must be some act or some forbearance by him. But will every act or every forbearance be a detriment, or must the word be restricted to certain acts and forbearances? It is certainly a common opinion that the word is to be interpreted in the restricted sense and cannot properly include an act or forbearance already due from the promisee by reason of some pre-existing legal obligation. The inability of the writer to reconcile this opinion with the decided cases has led him to give to detriment its widest interpretation and to define con-

sideration as any act of forbearance or promise,¹ by one person given in exchange for the promise of another.

These two views may be tested by the consequences of their application to the following three classes of acts or forbearances: I. Forbearance to prosecute a groundless claim. II. Performance of a pre-existing contractual duty to a person other than the promisor. III. Performance of a pre-existing contractual duty to the promisor himself.²

Before discussing these cases, however, it is important to emphasize the fact that a promise, though given for an abundant consideration, may yet be unenforceable. This is true whether detriment be taken in the wider or the narrower sense of the word. An illustration will make this clear. An unscrupulous friend of the defendant in a criminal trial promises a juror a certain amount of money in consideration of his voting to the end for acquittal. The juror does so vote. Here we have a promise for what is unquestionably a detriment to the promisee. But obviously the juror has no legal remedy on his bargain. He will fail, however, not because he has given no consideration for the promise, but because public policy forbids the enforcement of so vicious a bargain. This distinction is brought out pointedly in several cases where the act forming the consideration for the promise was a tort. The promisee in these cases was a sheriff who, acting upon a creditor's promise of indemnity, seized goods which he had no right to seize. In all of them he was made to pay damages to the person injured, and in all of them, having acted in good faith, he was allowed to recover on the contract of indemnity.³ Had

¹ A promise is an act; but to prevent possible misapprehension it seems expedient to add the word "promise" in the definition.

² A subsequent paper will deal with the Nature of Consideration in Mutual Promises.

³ *Arundel v. Gardiner*, Cro. Jac. 652; *Elliston v. Berryman*, 15 Q. B. 205; *Robertson v. Broadfoot*, 11 Up. Can. Q. B. 407. In *Fletcher v. Harcot*, Winch, 48, Hutt. 55 s. c., an innkeeper, at the request of an officer and upon the latter's promise of indemnity, kept in custody at his inn for a day and a night a man whom the officer had arrested. It turned out that the prisoner had been wrongfully taken by the officer, and the innkeeper, having been compelled to pay damages for the false imprisonment in his inn, recovered judgment against the officer on his promise, because, as Hobart, C. J., and Hutton and Winch, JJ., said: "Be the imprisonment lawful or unlawful, he (the innkeeper) might not take notice of that. As if I request another man to enter into another man's ground and in my name to drive out the beasts and impound them and promise to save him harmless, this is a good assumpsit, and yet the act is tortious; but by Hutton, where the act appears in itself to be unlawful, there it is otherwise, as if I request you to beat another and promise to save you harmless, this assumpsit is not good, for the act appears in itself to be unlawful."

he known that he was committing a tort, he would unquestionably have failed to get reimbursement from the creditor. The consideration, however, would have been precisely the same in both cases. But the public policy was on his side in the one case and would be against him in the other.

As public policy may destroy the value of a contract where the consideration is an act, so it may have the same effect where the consideration is a forbearance. One, who is induced to refrain from a contemplated murder or other crime by the promise of money, renounces his freedom of action and gives the promisor precisely what he wanted in return for his promise. There is, therefore, a bargain. But it is obviously against the public good to permit one to obtain a right of action solely as a reward for abstaining from the commission of a crime. The same reasoning is applicable to cases where the promisee is induced to refrain from grossly immoral though not criminal acts, or where he forbears, in return for a promise, to commit what he knows to be a tort.¹ In all these cases of forbearance just mentioned, those who interpret detriment in the restricted sense would say that the forbearance was legally due from the promisee independently of the promise, and that the promisee must fail because there was no consideration for the promise. But inasmuch as the same result is reached whether it be said that the forbearance is no consideration, or that the forbearance is a consideration but the bargain inoperative on grounds of public policy, we need not consider these cases further, but pass at once to those instances where the decision must vary accordingly as one or the other of the two theories of detriment is adopted.

I. Forbearance to prosecute a groundless claim.

A line of decisions² extending over nearly three centuries seemed to have established firmly in our law the doctrine that forbearance to sue upon an unfounded claim would never support

¹ *Cowper v. Green*, 7 M. & W. 633; *McCaleb v. Price*, 12 Ala. 753; *Worthen v. Thompson*, 54 Ark. 151; *Bruton v. Wooton*, 15 Ga. 570; *Smith v. Bruff*, 75 Ind. 412; *Botkin v. Livingston*, 21 Kas. 232; *Wendover v. Pratt*, 121 Mo. 273; *Swaggard v. Hancock*, 25 Mo. App. 596; *Crosby v. Wood*, 6 N. Y. 369; *Tolhurst v. Powers*, 133 N. Y. 460; *Cleveland v. Lenze*, 27 Oh. St. 383. But see *contra* *Pool v. Clipson, Shepp. Faithful Counsellor*, (2 Ed.) 131.

² *Lord Gray's Case* (1566), 1 Roll. Ab. 28, pl. 57; *Stone v. Wythipool* (1588), Cro. El. 126; *Tooley v. Windham* (1590), Cro. El. 206; *Smith v. Jones* (1610), Yelv. 184; *Rosyer v. Langdale* (1650), Sty. 248; *Hunt v. Swain* (1665), T. Ray. 127; *Barber v. Fox* (1670), 2 Wms. Saund. 136; *Loyd v. Lee* (1718), 1 Stra. 94; *Jones v. Ashburnham* (1804), 4 East, 455; *Edwards v. Baugh* (1843), 11 M. & W. 641.

a promise given therefor; that the promisee's belief in the validity of his claim as well as the fact that the claim was fairly doubtful in law or fact were alike irrelevant circumstances. There is surely no objection on the score of public policy to the enforcement of a promise obtained by a promisee in return for his forbearance to sue upon a fairly doubtful or a *bona fide* claim. It follows, therefore, that the line of decisions just mentioned can be supported only on the theory that forbearance to prosecute an invalid claim is not a detriment. And the cases were in fact decided upon this principle. This view is clearly stated by Tindal, C. J., in *Wade v. Simeon*:¹ "Detrimental to the plaintiff it [forbearance] cannot be if he has no cause of action; and beneficial to the defendant it cannot be, for, in contemplation of law, the defence upon such an admitted state of facts, must be successful, and the defendant will recover costs; which must be assumed to be a full compensation for all legal damage he may sustain."

But this seemingly inveterate doctrine has been overruled. Since the case of *Longridge v. Dorville*,² decided in 1821, it has been generally agreed that forbearance to enforce a claim that might reasonably be thought doubtful will support a promise, although the claim be really invalid.³ In *Callisher v. Bischoffsheim*,⁴ it was decided in accordance with opinions expressed in *Cook v. Wright*,⁵ that a promise in consideration of forbearance of an invalid claim was binding unless the claim was made *mala fide*. This decision, though criticised by Brett, L. J., in *Ex parte Banner*,⁶ has been approved and followed in subsequent cases.⁷ The late English cases have been cited with approval in several recent American cases.⁸ The modern English rule accords so well with the views of business men, that it can hardly fail of general adoption in this country.⁹

¹ 2 C. B. 548, 564. See the similar statement by Maule, J., page 566.

² 5 B. & Ald. 117.

³ *Keenan v. Handley*, 2 D. J. & S. 283; *Wilby v. Elgee*, L. R. 10 C. P. 497. Many American decisions to the same effect are cited in Professor Williston's note to 1 Pars. Cont. (8 Ed.) 458.

⁴ L. R. 5 Q. B. 449.

⁵ 1 B. & S. 559.

⁶ 17 Ch. D. 480, 490.

⁷ *Ockford v. Barelli*, 25 L. T. Rep. 504; *Kingsford v. Oxenden*, 7 Times L. R. 13, 565 (C. A.); *Miles v. New Zealand Co.*, 32 Ch. Div. 266.

⁸ *Prout v. Pittsfield District*, 154 Mass. 450; *Grandin v. Grandin*, 49 N. Y. 508; *Wahl v. Barnum*, 116 N. Y. 87; *Hewett v. Currier*, 63 Wis. 386.

⁹ The following cases in addition to those already cited, support the doctrine of *Callisher v. Bischoffsheim*. *Union Bank v. Geary*, 5 Pet. 99; *Morris v. Munroe*, 30 Ga.

In the light of this change in the law it can no longer be maintained that forbearance to prosecute a groundless claim is not a detriment. And as the validity of a promise given for such forbearance depends upon the good faith of the promisee, that is upon public policy, the forbearance cases support the writer's view that consideration is any act or forbearance by one person given in exchange for the promise of another.

II. Performance of a pre-existing contractual¹ duty to a person other than the promisor.

As early as 1616 it was decided in *Bagge v. Slade*,² that an action would lie upon a promise, the only consideration for which was the performance of a prior contract with a third person.

A bond executed by a principal and by A and B as sureties being forfeited, B requested A to pay the whole debt to the obligee promising to pay him a moiety. A paid accordingly and brought *Assumpsit* against B for refusing to keep his promise. It was objected that there was no consideration for the promise, since A was already bound to the obligee for the full amount of the bond. But the court gave judgment for A, Coke, C. J., saying: "I have never seen it otherwise but when one draws money from another, that this should be a good consideration to raise a promise. In considering this case it should be remembered that in the absence of an express contract there was at this time no right of contribution for a surety either at law or in equity."³ *Moore v. Bray*⁴ was

630; *Hayes v. Mass. Co.*, 125 Ill. 626, 639; *Ostrander v. Scott*, 161 Ill. 339; *Leeson v. Anderson*, 99 Mich. 247, 248; *Hanson v. Garr*, 63 Minn. 94. There are a few recent decisions to the contrary; *Sweitzer v. Heasley*, 13 Indiana Ap. 567; *Peterson v. Breitag*, 88 Iowa, 418, 422, 423; *Emmitsburg v. Donoghue*, 67 Md. 383. Other earlier decisions will be found in 1 Pars. Cont. (8 Ed.) 458 n.

¹ Promises given in consideration of the performance of official duties, or duties to the public, are not enforceable. Public policy, rather than the absence of consideration, it is submitted, is the sound reason for denying a right of action on such promises. But, the result being the same on either view, they fall without the scope of this article. The authorities are well collected in the note to 1 Parsons, Cont. (8th ed.) 452. See also *Willis v. Peckham*, 1 Br. & B. 515 (duty of witness to attend court); *Crowhurst v. Laverack*, 8 Ex. 208 (duty of mother to support illegitimate child); *Keith v. Miles*, 39 Miss. 442 (duty of ward to obey guardian), and especially *Leake*, Cont. (2d ed.) 99.

² 3 Bulst. 162, 1 Roll. R. 354, s. c.

³ In *Wormleighton v. Hunter* (1613), Godb. 243, a surety having exhibited an English Bill in the Court of Requests praying for contribution, the Common Pleas granted a prohibition, saying: "If one surety should have contribution against the other, it would be a great cause of suits."

⁴ 1 Vin. Ab. 310, pl. 31; but see *Westbie v. Cockayne* (1631), 1 Vin. Ab. 312, pl. 36, *contra*.

a similar case, decided in the same way, in 1633. An anonymous case of 1631 is thus reported in Sheppard's Action on the Case: ¹ "If A owe to B twenty pounds and C say to A pay him his twenty pounds and I will pay it to you again, this is a good consideration and promise. Adjudged."

These early precedents seem to have been forgotten. But the question involved in them arose in the Common Pleas in 1860, in the Exchequer in 1861, and in the Queen's Bench in 1866; and in all three cases the plaintiff was successful.² One may safely assert, therefore, that by the law of England the performance of a contract with a third party is a consideration for a promise. It is obviously impossible to reconcile this rule of law with the restricted interpretation of detriment as an act or forbearance other than the fulfilment of a legal duty.³ But here again all difficulty disappears if we take detriment in the wider sense of any change of position, that is, any act or forbearance given in exchange for a promise.

It must be conceded that in this country a majority of the decisions and *dicta* are opposed to the doctrine of *Shadwell v. Shadwell*, *Scotson v. Pegg*, and *Chichester v. Cobb*.⁴ But in most of them the English cases were not brought to the attention of the court. And it is certainly a significant fact that the latest decisions show a marked tendency towards the English rule.⁵ The decision of the Massachusetts court is all the more valuable because given in the light of the authorities on both sides of the question. It would

¹ (2d ed.) 155-156.

² *Shadwell v. Shadwell*, 9 C. B. N. s. 159; *Scotson v. Pegg*, 6 H. & N. 295; *Chichester v. Cobb*, 14 L. T. Rep. 433. See also *Skeete v. Silverburg*, 11 Times L. R. 491. But see *dicta* to the contrary in *Jones v. Waite*, 5 Bing. N. C. 541.

³ The cases on this point have proved very troublesome to text-writers. Anson, Cont. (8 ed.) 91, 92; Pollock, Cont. (6 ed.) 175-177; Langdell, Summary of Cont. § 54.

⁴ *Johnson v. Seller*, 33 Ala. 265 (*seem*); *Havana Co. v. Ashurst*, 148 Ill. 115, 136 (*seem*); *Peetman v. Peetman*, 4 Ind. 612; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Andrews*, 42 Ind. 7; *Harris v. Cassady*, 107 Ind. 156; *Beaver v. Fulp*, 136 Ind. 595; *Schuler v. Myton*, 48 Kan. 282; *Putnam v. Woodberry*, 68 Me. 58; *Gordon v. Gordon*, 56 N. H. 170, 173 (*seem*); *Ecker v. McAllister*, 45 Md. 290; 54 Md. 362, s. c.; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Robinson v. Jewett*, 116 N. Y. 40; *Arend v. Smith*, 151 N. Y. 502; *Allen v. Turck*, 8 N. Y. App. Div. 50; *Hanks v. Barron*, 95 Tenn. 275; *Davenport v. Congregational Society*, 33 Wis. 387.

⁵ *Humes v. Decatur Co.*, 98 Ala. 461, 473 (*seem*); *Abbott v. Doane*, 163 Mass. 433; *Monnahan v. Judd*, 165 Mass. 93, 100 (*seem*); *Wilhelm v. Foss* (Michigan, 1898), 76 N. W. Rep. 308 (*seem*); *Day v. Gardner*, 42 N. J. Eq. 199, 203 (*seem*); *Green v. Kelley*, 64 Vt. 309; see also *Grant v. Duluth Co.*, 61 Minn. 395, 398.

not be surprising, if ultimately a considerable majority of the American courts, not already fettered by their own precedents, should adopt the English and Massachusetts rule, which has the great merit of not hampering, by a technicality, freedom of contract.

III. Performance of a pre-existing contractual duty to the promisor himself.

The question, whether a promise is enforceable where the promisor gets for it only what the promisee was already bound by contract to give him, has generally arisen in cases where a part of the amount due has been given and received in satisfaction of a debt. The ruling of the courts is well-nigh universal that, notwithstanding the partial payment upon such terms, the creditor may recover the rest of the debt. As the rule is commonly expressed, the payment of a part of a debt cannot be a satisfaction of the whole. And the rule is commonly thought to be a corollary of the doctrine of consideration. But this is a total misconception. The rule is older than the doctrine of consideration and is simply the survival of a bit of formal logic of the mediæval lawyers.

The earliest allusion to the effect of a partial payment in satisfaction of a debt that the writer has found is the remark of Danvers, J., in 1455;¹ and he, strange to say, thought the part payment should be effective: "Where one has *quid pro quo*, there it shall be adjudged a satisfaction. As if one be indebted to me in 40 pounds and I take from him 12d. in satisfaction of the 40 pounds, in this case I shall be barred of the remainder." Forty years later,² Fineux, J., expressed a similar opinion. "I think there is no difference between accord and satisfaction in money and in a horse. For notwithstanding the sum is less than that in demand, still when the creditor has received it by his own agreement it is as good a satisfaction to him as anything else." But Brian, C. J., said in the same case: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand. And notwithstanding the horse may be worth only a penny, that is not material, for it is not apparent." Perkins in his *Profitable Book*,³ first published in 1532, agreed with Danvers and

¹ Y. B. 33 Hen. VI. f. 48, A. pl. 32.

² Y. B. 10 Hen. VII., f. 4, pl. 4.

³ F. 141 of edition of 1545; § 749 of edition of 1757.

Fineux: "If a man be bounden in 100 pounds to pay 100 marks unto the obligee, and the obligee accept of 10 pounds of the obligor in satisfaction of 100 marks, it is a good performance of the condition; and yet some have said the contrary, because 10 pounds cannot be satisfaction of 100 marks. But that is not material in his case because the obligee is content therewith." But this protest was powerless against the logic of Brian. In 1561 all the judges agreed that "the payment of 20 pounds cannot be a satisfaction for 100 pounds."¹ In 1602 came Coke's celebrated dictum in *Pinnel's case*:² "Resolved by the whole Court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of a parcel can be a satisfaction to the plaintiff."³ The same reasoning occurs in the *Commentary on Littleton*:⁴ "because it is apparent that a lesser sum of money cannot be a satisfaction of a greater."

As the learned reader will have observed, there is no allusion in any of these remarks of the judges to the consideration for an *assumpsit*. The word *consideration*, in its modern sense, was unknown to Brian, and the action of *assumpsit* itself was, in his day, in the embryonic stage. To his mind, whether 10 pounds could be a satisfaction of 20 pounds was a question of simple arithmetic which admitted of only one answer. Ten cannot be twenty, the part cannot be the whole. Coke was presumably familiar with Brian's statement. At all events he reasoned in precisely the same axiomatic way: "It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater." It is sufficiently obvious from the similarity of the language of Coke and Brian that it never occurred to the former that the resolution in *Pinnel's*

¹ Note, Dal. 49, pl. 13. To the same effect Anon. (1588) 4 Leon. 81, pl. 172, "Per curiam, 5 pounds cannot be a satisfaction for 10 pounds."

² 5 Rep. 117, a; Moo. 677, pl. 923, s. c.

³ In the report of the same case in Moore it is said: "But payment of part at the day and place cannot be, though accepted, satisfaction of the whole of the same kind." See also *Goring v. Goring*, (1602) Yelv. 11.

⁴ 212, b.

case was based upon any doctrine of consideration. But, fortunately, Coke's opinion is not a mere matter of inference. We have his own explicit statement, discriminating in the sharpest way between the operation of part payment as a satisfaction and as a consideration. In *Bagge v. Slade*¹ he said: "If a man be bound to another by a bill in 1000 pounds and he pays unto him 500 pounds in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 1000 pounds, this 500 pounds is no satisfaction of the 1000 pounds, but yet this is good and sufficient to make a good promise and upon a good consideration because he has paid money, 500 pounds, and he hath no remedy for this again." In 1639 the obligor recovered judgment upon a promise like that in the case put by Coke, the Court saying: "For though legally, after the obligation is forfeited, 30 pounds can be no satisfaction for 60 pounds, yet to have the money in his hands without suit is a good consideration to maintain this action upon the promise."² There are several other cases where payment of part of what was due was adjudged a sufficient consideration to support a promise to deliver up the obligation.³ There are also cases in which payment of the whole was deemed a consideration for a similar promise.⁴ In *Morris v. Badger*⁵ it was decided, in 1621, that payment by a surety would support a promise by the creditor to sue the principal and hold the amount recovered for the benefit of the surety. In *Hubbard v. Farrer*,⁶ decided in 1635, a promise by an

¹ 3 Bulst. 162, 1 Roll. R. 354, Jenk. Cent. Cas. 324, pl. 38, Harv. Ms. R. temp. 14 James I., 2, s. c.

² *Rawlins v. Locky*, (1639) 1 Vin. Ab. 308, pl. 24.

³ *Reynolds v. Pinhowe*, (1595) Cro. El. 429, 1 Roll. Ab. 28, pl. 54, Moo. 412, s. c.: "Because speedy payment excuses and prevents labour and expense of suit;" *Anon.*, (1598) 1 Roll. Ab. 27, pl. 53, per Popham, C. J. *Johnson v. Astill*, (1667) 1 Lev. 198, 2 Keb. 155 s. c.: "By the Court. Payment without suit or trouble of that which is due is a good consideration." See also the opinion of Littledale, J., to the same effect in *Wilkinson v. Byers*, 1 A. & E. 106.

⁴ *Cook v. Huet*, (1581) 1 Leon. 238, pl. 317 (cited), Cro. El. 194 (cited) s. c.; *Anon.*, Hutt. 101 (cited); *Flight v. Crasden*, (1625) Cro. Car. 8, Hutt. 76, s. c.: "It is consideration sufficient to have it paid without suit or trouble." *Anon.*, (1675) 1 Vent. 1675: "Payment of a debt without suit is a good consideration."

Dixon v. Adams, (1596) Cro. El. 538, Moo. 710 s. c. is *contra*, but, so far as the writer has discovered, is the only reported English decision in which the plaintiff failed in an action upon a promise given in consideration of the payment of money due. There are dicta to the same effect in *Richards v. Bartlett*, (1582) 1 Leon. 19; *Greenleaf v. Barker*, (1596) Cro. El. 193.

⁵ Palm. 168, Harv. Ms. Rep. temp. 2-22 James I., f. 181, pl. 6, s. c.

⁶ 1 Vin. Ab. 306, pl. 17.

obligee, in consideration of payment of less than the amount due by the principal obligor, not to sue the surety, was held to be a valid contract, "for it is a good consideration for the obligee to have money in his purse, it being before only a chose in action."

The subsequent history of the mediæval doctrine, that a partial payment of a debt cannot be a satisfaction of the whole amount due, although so intended by the parties, is soon told. In *Cumber v. Wane*,¹ in 1721, the defendant pleaded to an action of indebitatus assumpsit that his own negotiable note for five pounds had been given and received in satisfaction of the debt. The plaintiff objected that the plea was ill, "it appearing that the note for 5 pounds could not be a satisfaction for 15 pounds. . . . Even the actual payment of 5 pounds would not do, because it is a less sum. Much less shall a note payable at a future day." This argument prevailed. Pratt, C. J., said: "We are all of opinion that the plea is not good. . . . If 5 pounds be (as is admitted) no satisfaction for 15 pounds, why is a simple contract to pay 5 pounds a satisfaction for another simple contract for three times the value." The next judicial allusion to the doctrine appears to be a *dictum* of Buller, J., in 1798: "Whether an agreement by parol to accept a smaller sum in satisfaction of a larger can be pleaded or not I do not know. It was formerly considered that it could not, and was so decided in Coke. I think, however, there are some late cases to the contrary, and one in particular in Lord Mansfield's time, who said that, if a party chose to take a smaller sum, why should he not do it? There may be circumstances under which such an agreement might not only be fair, but advantageous."² But this *dictum* has had no effect. Six years later the old rule was reasserted in *Fitch v. Sutton*.³ Lord Ellenborough, unaware of the true origin of the rule and unacquainted with *Bagge v. Slade* and the kindred cases of the seventeenth century, put forward the novel view that the rule was based upon the doctrine of consideration. "There must be some consideration for the relinquishment of the residue; something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." This statement by

¹ Stra. 426. *Cumber v. Wane*, though clearly coming within the reasoning of *Brian and Coke* (see also *Geang v. Swaine*, 1 Lutw. 464, 466), and approved in *Fitch v. Sutton*, 5 East, 230, 232, and *Thomas v. Heathorn*, 2 B. & C. 477, 481, was overruled in *Sibree v. Tripp*, 15 M. & W. 22.

² *Stock v. Mawson*, 1 B. & P. 286, 290.

³ 5 East, 230.

Lord Ellenborough, false gloss though it be, has been generally followed by the courts, and is responsible for the greater part of the objectionable applications of the doctrine of consideration, whereby the reasonable expectations of business men have been disappointed.

But notwithstanding its general acceptance, this doctrine of Lord Ellenborough has met with almost unparalleled animadversion at the hands of the judges who have applied it.¹

The law has been changed by statute in India,² and in at least ten of our States.³ In one State, Mississippi, the rule was abolished by the Court without the aid of a statute.⁴ There are also limitations to the rule, which emphasize its artificiality. It is common

¹ A creditor "might take a horse or a canary or a tomtit, if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. . . . That was one of the mysteries of the English Common Law." Per Jessel, M. R., in *Couldery v. Bartrum*, 19 Ch. D. 394, 399. "This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import." Per Dewey, J., in *Brooks v. White*, 2 Met. 283, 285. "The rule is technical and not very well supported by reason." Per Nelson, J., in 14 Wend. 116, 119. "The rule is evidently distasteful to the courts, and they have always been anxious to escape it by nice distinctions." Per Curiam in *Smith v. Ballou*, 1 R. I. 496. "A doctrine utterly absurd, and standing, as it confessedly does, in humiliating contrast to the common sense of mankind." Per Munro, J., 11 Rich. 135, 139. "Several courts seem to have given assent to the rule with reluctance, and condemned the reasoning which supports it." Beck, C. J., in *Works v. Hershey*, 35 Iowa, 340, 342. "This rule being highly technical in its character, seemingly unjust, and often oppressive in its operation." Per Hinton, J., in *Symme v. Goodrich*, 80 Va. 303, 304. "The history of judicial decisions has shewn a constant effort to escape from its absurdity and injustice. . . . A moment's attention to the cases taken out of the rule will show that there is nothing of principle left in the rule itself." Per Ranney, J., in *Harper v. Graham*, 20 Ohio, 105, 115-118. "The courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty." Per Potter, J., in *Jaffray v. Davis*, 124 N. Y. 164, 167. Many similar criticisms might be added.

² Indian Contract Act, Sec. 63.

³ Ala. Code, Sec. 2774; Cal. Civ. Code, Sec. 1524; Dak. Comp. Laws, Sec. 3486; Ga. Code, Sec. 3735; Maine Rev. St., c. 82, Sec. 45; No. Car. Code, Sec. 574; N. Dak. Rev. Code, Sec. 3827; Hill, Ann. Laws of Oregon, Sec. 755; Tenn. Code, (1884) § 4539; Va. Code, (1897) § 2858.

⁴ *Clayton v. Clark*, 74 Miss. 499. See also to the same effect *Smith v. Wyatt*, 2 Cincin. Sup. Ct. 12. By decision, too, in some States, a parol debt may be satisfied if the creditor gives a receipt in full for a partial payment. *Green v. Langdon*, 28 Mich. 221; *Lamprey v. Lamprey*, 29 Minn. 151 (*semble*); *Gray v. Barton*, 55 N. Y. 68; *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251; *McKenzie v. Harrison*, 120 N. Y. 260. In others, partial payment is a satisfaction if the debtor is insolvent. *Westcott v. Waller*, 47 Ala. 492, 498 (*semble*); *Shelton v. Jackson*, (Tex. Civ. Appeals, 1899) 49 S. W. Rep. 414, or even if he is honestly believed to be insolvent. *Rice v. London Co.*, (Minnesota, 1897) 72 N. W. Rep. 826.

learning, for instance, that payment of the smallest sum the day before the debt matures, or at a different place, may be an accord and satisfaction of the largest debt. At the present day, too, *Cumber v. Wane* having been overruled,¹ the debtor's own promise to pay five pounds, if in the form of a negotiable note, may be a satisfaction of a debt of one thousand pounds. Again, an unliquidated claim, however large, may be settled by the payment of any amount, however small.

These limitations may be logically defensible. But the same cannot be said of the important class of cases, in which two or more creditors acting in concert compromise with their debtor upon payment of a percentage of their claims. The application of the modern doctrine, as stated by Lord Ellenborough, in these cases threatened a result so alarmingly at variance with the needs of business men, that the courts declined to apply the doctrine. Such compromises have been deemed valid since the case of *Good v. Cheeseman*.² The court professed to find a consideration for each creditor's promise to relinquish a part of his claim in the similar agreement of his fellow creditors. But it is obvious that in England, at least, the debtor could acquire no rights on a promise by virtue of a consideration that did not move from himself.³ The frank way of dealing with these cases is to say that they can be supported only upon Coke's view, that the payment of part of a debt is a good consideration for the creditor's promise to relinquish all claim to the rest.⁴ In his day, it is true, the only way in which

¹ *Sibree v. Tripp*, 15 M. & W. 22; *Goddard v. O'Brien*, 9 Q. B. Div. 37; *Wells v. Morrison*, 91 Ind. 51; *Jaffray v. Davis*, 124 N. Y. 164 (*semble*); *Mechanics' Bank v. Huston*, 11 W. N. (Pa.) 389; *Jaffray v. Crane*, 50 Wis. 349. But see *contra*, *Overdeer v. Wiley*, 30 Ala. 769; *Siddall v. Clark*, 89 Cal. 321; *Post v. First Bank*, 138 Ill. 539 (*semble*); *Jenness v. Lane*, 26 Me. 475; *Russ v. Hobbs*, 61 N. H. 93; *Hooker v. Hyde*, 61 Wis. 204.

² 2 B. & Ad. 328; *Boyd v. Hind*, 1 H. & N. 938; *Slater v. Jones*, L. R. 8 Ex. 186, 193. The rule is the same in this country. *Perkins v. Lockwood*, 100 Mass. 249, 250; *Bartlett v. Woodworth Co.* (N. H., 1898), 41 Atl. Rep. 264; *White v. Kuntz*, 107 N. Y. 518; *Continental Bank v. McGeoch*, 92 Wis. 286.

³ Professor Huffcut, in his edition of Anson's Law of Contract, 108, n. 1, makes an excellent criticism of the futile attempts that have been made to find in the cases of composition with creditors some other consideration than the partial payment of the debts due.

⁴ Lord Fitzgerald said in *Foakes v. Beer*, 9 App. Cas. 605, 630: "I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's* case had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of the creditors."

the debtor could make use of such a promise was by a cross action. But in recent times such a promise would serve as a bar to an action upon the partially paid debt, on the ground of avoiding circuity of action, since what the creditor recovered in his action against the debtor, he would have to repay as damages in the cross action.

By this simple process, without any impeachment of the logic of Brian, or of the resolution in Pinnel's case, the mediæval rule that there cannot be an accord and satisfaction of a debt by a payment of part of it, would have ceased to have any practical operation; full effect would have been given to reasonable bargains of business men; and the law of consideration would have gained greatly in simplicity and freedom from annoying technicalities.

In 1882 the House of Lords were in a position to bring about this greatly to be desired result. In *Foakes v. Beer*,¹ a creditor, in consideration of the payment of the principal of the debt undertook to relinquish all claim to interest. The Lords with great reluctance, Lord Blackburn all but dissenting, gave judgment for the plaintiff, and chiefly for the reason that they were not prepared to overrule, as contrary to law, the doctrine stated by Coke in Pinnel's case. It is greatly to be deplored that the case of *Bagge v. Slade*, and the other similar cases, were not brought to the attention of the court. Had Coke's real opinion, as expressed in that case, been made known to the Lords, it is not improbable that they would have followed it, instead of making him stand sponsor for a doctrine contrary to his declared convictions.

Wherever a promise to relinquish a debt given in consideration of its partial payment is inoperative, a promise of temporary forbearance for the same consideration must be invalid. But no English case to this effect has been found. There are, however, numerous American decisions on the point.²

If a promise by a creditor in consideration of the payment of a part or the whole of a debt is not enforceable, it follows that a promise in consideration of the performance of any other act due

¹ 9 App. Cas. 605.

² *Liening v. Gould*, 13 Cal. 598; *Solary v. Stultz*, 22 Fla. 263; *Holliday v. Poole*, 77 Ga. 159; *Bush v. Rawlins*, 89 Ga. 117; *Phoenix Co. v. Rink*, 110 Ill. 538; *Shook v. State*, 6 Ind. 461; *Dare v. Hall*, 70 Ind. 545; *Davis v. Stout*, 84 Ind. 12; *Potter v. Green*, 6 All. 442; *Warren v. Hodge*, 121 Mass. 106; *Kern v. Andrews*, 59 Miss. 39; *Price v. Cannon*, 3 Mo. 453; *Tucker v. Bartle*, 85 Mo. 114; *Russ v. Hobbs*, 61 N. H. 93; *Parmalee v. Thompson*, 45 N. Y. 58; *Turnbull v. Brock*, 31 Oh. St. 649; *Yeary v. Smith*, 45 Tex. 56, 72.

by contract to the promisor should be deemed invalid. But there is a singular dearth of cases in the English courts. The only cases found by the writer are those in which actions were brought by seamen on promises of extra compensation in consideration of their doing their duty during a storm, or after the desertion of some of the crew.¹ The seamen were unsuccessful in these cases, and rightly so on the ground of public policy. But in some of the cases the court gave the additional reason that the promise was without consideration.

In this country there are numerous cases in which, after the making of a bilateral contract, by which one party was to perform certain work or deliver certain merchandise, and the other was to pay a certain price therefor, one of the parties finding his bargain a losing one threatened to abandon it, whereupon the other party promised him something additional to induce him to continue. If at the time of the new promise the original contract remained to some extent executory on both sides, the new arrangement might conceivably assume different forms. Suppose, for instance, a building contract under seal, and the builder to be dissatisfied and to break his contract; the parties might mutually agree the one to go on with his work, the other to pay extra compensation. It is unreasonable to suppose that either party understood that the builder was to continue liable to an action for his breach of the original contract, or that the builder in case of non-payment would have to resort to two actions, — one upon the old contract for the original price, and one upon the new contract for the *bonus*. In other words, the parties contemplated a substitution of a new contract in place of the old one. The new contract, stated in terms of consideration, would be as follows: "In consideration that the builder promises to complete the job and to abandon all claim against the employer on the old contract, the employer promises to pay the builder the old price plus an additional amount, and to abandon his claim against the builder on the old contract." This would be a case of rescission, and the builder's right of recovery would be clear on either of the two theories of consideration under discussion in this paper.²

¹ *Harris v. Watson*, Peake, 72; *Stilk v. Myrick*, 6 Esp. 129, 2 Camp. 317 S. C.; *Fraser v. Hutton*, 2 C. B. (N. S.) 912; *Harris v. Carter*, 3 E. & B. 559; *Scotson v. Pegg*, 6 H. & N. 295, per Martin, B. See also *Bartlett v. Wyman*, 14 Johns. 260.

² The following cases, in which the plaintiff recovered on the new contract, appear to have been rightly decided; *Stoudermeir v. Williamson*, 29 Ala. 558; *Connelly v.*

Again, in the case above supposed, the employer might promise to pay the extra compensation, and the builder might complete the job, but without giving any new promise to do so. This arrangement would probably mean a substitution of a new contract for the old one. "In consideration of the builder's promise to abandon all claim against the employer on the old contract, the employer promises to abandon all claim on the old contract, and to pay the old price plus the additional amount, provided the builder completes the job." This would also be a case of rescission, and the builder would be entitled to sue on the new contract on any theory of consideration.¹

On the other hand, one of the parties to the original contract may have performed everything on his side, and the other party then refuse to do his part. If, under these circumstances, the one who has performed his part promises something extra for the other's performance, there can be no question of rescission. The case is the same in principle as the promise of a creditor in consid-

Devoe, 37 Conn. 570; Bishop v. Busse, 69 Ill. 403; Cooke v. Murphy, 70 Ill. 96; Coyner v. Lynde, 10 Ind. 282; Courtenay v. Fuller, 65 Me. 156; Munroe v. Perkins, 9 Pick. 298; Holmes v. Doane, 9 Cush. 135; Rollins v. Marsh, 128 Mass. 116; Rogers v. Rogers, 139 Mass. 440; Thomas v. Barnes, 156 Mass. 581; Goebel v. Linn, 47 Mich. 489; Conkling v. Tuttle, 52 Mich. 630; Osborne v. O'Reilly, 42 N. J. Eq. 467; Lattimore v. Harsen, 14 Johns. 440; Stewart v. Keteltas, 36 N. Y. 388; Nesbitt v. R. R. Co., 2 Speers, 697, 706 (*semble*).

The plaintiff failed in Ayres v. Chicago Co., 52 Iowa, 478; McCarty v. Hampden Association, 61 Iowa, 287; King v. Duluth Co., 61 Minn. 482; Lingenfelder v. Wainwright Co., 103 Mo. 578. But the question of rescission was not adequately considered.

In King v. Duluth Co., *supra*, the court made a distinction nowhere suggested. The validity of the new agreement was made to turn upon the circumstances under which the losing party declined to go on. If he declined simply because he had made an unfortunate bargain, the new agreement was said to be inoperative for want of a consideration. But if he declined because of difficulties that could not reasonably have been foreseen, the new agreement would be a valid substitution for the old contract. The consideration is obviously the same in both cases. In truth, the court, in suggesting this distinction, abandoned their professed doctrine of consideration, and introduced the test of public policy. Furthermore, in defining this test, the court was unduly severe upon the plaintiff. Surely it cannot be against the public good to permit the parties to rescind the old contract and to make a new one for greater compensation to one of the parties, when the latter has made an unfortunate bargain which he honestly prefers to abandon, whatever be the consequences. On the other hand, it may well be maintained, on grounds of policy, that one who refuses to keep his contract simply in order to exploit the necessities of the other party, should not be permitted to enforce a new agreement for extra compensation obtained in a manner savoring so strongly of extortion.

¹ Moore v. Detroit Works, 14 Mich. 266; Lawrence v. Davey, 28 Vt. 264. But the right of the plaintiff to recover was denied in Festerman v. Parker, 10 Ired. 474.

eration of payment of the debt due to him. Only three reported cases presenting such a state of facts have been found, *Peck v. Requa*,¹ *Gaar v. Green*,² and *Schneider v. Heinsheimer*.³ In the first of these cases the plaintiff refused to fulfil his contract with the defendant to resign a certain office on request, and the defendant, to induce him to keep his promise, gave him his promissory note. It was urged, but unsuccessfully, that there was no consideration for the note. In the second case, the buyer of a machine, for which, if kept more than six days, he was to give a note and mortgage, declined, after the six days, to keep his promise. The seller, in order to obtain the note and mortgage, then warranted the quality of the machine. The court decided that the warranty was not binding. The agreement was adjudged invalid in the third case also.

To the writer the decision in *Peck v. Requa* seems sound, but the language of the court is certainly surprising in a jurisdiction in which the doctrine of *Foakes v. Beer* is maintained: "Previously he had only the plaintiff's agreement to resign. By the new contract he obtained from the plaintiff his actual resignation, and in consideration thereof he gave the note in suit. By the surrender of an office which he had a right⁴ to retain, the plaintiff suffered a detriment, and the defendant thereby gained an advantage which furnished a valid consideration for the note." It is evident from the paucity of such cases that the question, whether the performance of a pre-existing contractual duty to the promisor will support a promise, seldom arises, except in the case of a promise in consideration of the payment of part or the whole of a debt.

The examination of our three classes of cases, of which *Callisher v. Bischoffsheim*, *Shadwell v. Shadwell*, and *Foakes v. Beer* are the conspicuous illustrations, makes it clear that the authorities cannot be reconciled with any theory of consideration. We must either adopt the view that consideration is an act or forbearance not already due from the promisee, and treat the first two classes of cases as exceptions, indefensible on principle, but established as law in England, and either already representing, or likely to represent, the predominant judicial opinion in this country, or else we must adopt the other view, that consideration is any act or forbearance by the promisee, and regard the third class of cases, of which

¹ 13 Gray, 407.

² 6 N. Dak. 48.

³ 55 N. Y. Sup. 630.

⁴ This must mean simply that he could not be ejected from the office.

Foakes *v.* Beer is the type, as an exception contrary to principle, but sanctioned by the highest judicial authority in England and the United States.

Bearing in mind that the decisions in *Callisher v. Bischoffsheim* and *Shadwell v. Shadwell* accord with the sentiments of business men, and that it is in the highest degree improbable that the doctrine of those cases will ever be reversed by the court or overthrown by statutes in the jurisdictions in which it has once been adopted; and remembering, on the other hand, that the doctrine of *Foakes v. Beer*, originated in misconception, is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions, has been changed by statute in India and in ten of our States, and is likely to be generally superseded by similar legislation, the writer does not hesitate to choose the second of the above alternatives, and to define consideration as "any act or forbearance given in exchange for a promise," with this qualification, however, that, for the present, by an unfortunate but established anomaly, a creditor's promise in consideration of the payment of the whole or a part of the debt by his debtor is invalid. This definition unquestionably makes for individual freedom of contract and for logical simplicity in the law. It is believed, also, to be a just deduction from the decided cases.

James Barr Ames.

INTERSTATE CRIME AND INTERSTATE EXTRADITION.¹

THE commission of crimes across State boundary lines has given serious trouble, and justice has been cheated, where the State from which the criminal agency emanated has been upon a simple common-law basis. One of the most famous cases is that of *State v. Hall*, in the Supreme Court of North Carolina. It appeared that the defendants, being in North Carolina, fired a shot which caused the death of a person who was across the boundary line in Tennessee. The defendants were tried for murder in North Carolina, but the Supreme Court of that State held² that the courts of Tennessee alone had jurisdiction, because the prisoners "were deemed by the law to have accompanied the deadly missile sent by them across the boundary and to have been constructively present when the fatal wound was actually inflicted."

In the opinion a large number of authorities from the different States of the Union are collated, all substantially agreeing that the locus of a crime is the place where the criminal act takes effect. It is remarked in the opinion:—

"It is true that in Wharton's Criminal Law (§ 288) it is said in a general way that 'a concurrent jurisdiction exists in the place of starting the offence;' but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are uttered in one State to take effect in another (*U. S. v. Worrall*, 2 Dal. 388); or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (*Green v. State*, 66 Ala. 40); or where an accessory before the fact in one State to the felony committed in another was held to be indictable in the State where he became accessory (*State v. Chapin*, 17 Ark. 560); or in certain cases of false pretences or in conspiracies where an overt act is committed at the place of the trial; or where, by statute, a particular 'section' of an offence committed in one jurisdiction is there made indictable, as for instance,

¹ An address delivered by Mr. Larremore before the New York State Bar Association on January 17, 1899. — ED.

² 114 N. C. 909.

the act of shooting or unlawfully using a deadly weapon within the State, as in the present case. In some instances they may be concurrent jurisdiction of the whole offence, and in others there may exist the jurisdiction of an attempt in one State and of the consummated offence in another."

It seems quite clear that statutes should be generally adopted giving concurrent jurisdiction of offences as a whole both in the State in which the criminal act is set in motion and the State in which the crime is consummated. Such a statute exists in the State of California, and one substantially similar in terms is also a part of the law of New York. The California Penal Code provides that "all persons who commit, in whole or in part, any crime within that State are liable to punishment within its laws." Under the authority of this law, the trial of Mrs. Botkin has just been concluded, and she has been convicted of murder upon the theory that she deposited poisoned candy in the mail within the State of California directed to a person in the State of Delaware, where it was received by the latter, who died from eating it. There was some discussion on the trial, and the question will doubtless be argued elaborately on appeal, whether the cause of the Penal Code sufficiently covered the case. The statute might have been more specifically phrased, but it is difficult to understand just what its language referred to if not to such a case as that of Mrs. Botkin, and certainly the signification given to it was in the interests of justice. The provision of the New York Penal Code (section 16) is that a person is punishable criminally "who commits within the State any crime, in whole or in part." It is probable that, in New York as well as in California, the provision in question would be held to apply to a person setting a crime in motion within a State, to take effect outside, but if such statutes are inadequate in form they should be amended to meet the necessity.

A criticism that may be made upon such proposed policy is that it might result in a person being tried twice for the same offence. The force of this suggestion lies in the fact that the constitutions of a few of the States do not contain a second jeopardy clause. Nevertheless it still would seem to be a less evil to recognize jurisdiction of the crime in both the States than to let the criminal go scot-free, as seems to have been the ultimate result in *State v. Hall* (*supra*). Even though one of two States concerned did not have a second jeopardy provision, there is slight probability that

a second prosecution would be instituted and pushed with energy after an acquittal on the merits upon a fair trial in the State first acquiring physical possession of the prisoner and full jurisdiction of the offence.

The inquiry naturally suggests itself, why not extradite the culprit from the State in which he set his crime in motion to the State in which it accomplished its result. In the North Carolina-Tennessee case, above referred to, such an attempt was made and the right to such interstate rendition was denied.¹ I think this was proper, even though the circumstances were very flagrant and the miscarriage of justice very gross. The discussion of the grounds for such refusal renders desirable some little general consideration of the subject of interstate extradition or rendition. The right is conferred by the second section of Article IV. of the Constitution of the United States, which provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on the demand of the executive authority of the State, from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." This language is merely declaratory of a general principle, and in order, in part at least, to furnish *modus operandi*, Congress as early as 1793 passed a statute, the salient portions of which have been re-enacted in sections 5278 and 5279 of the Federal Revised Statutes, and read in part as follows: —

"Whenever the Executive authority of any State or Territory demands any person as a fugitive from justice of the Executive authority of any State or Territory to which such person has fled, and shall produce a copy of an indictment found or an affidavit made before a magistrate or any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the Executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appear within six months from the time of the arrest, the prisoner may be discharged.

¹ *State v. Hall*, 115 N. C. 811.

"Any agent so appointed who shall receive the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled."

During the agitated period preceding the Rebellion, when the Slavery controversy was acute, conflicts arose between the governors of demanding States and the governors of States of refuge of fugitives, as to whether an act should be recognized as a ground of rendition which constituted a crime in the State in which it was performed, and from which its performer had fled, but did not constitute a crime in the State in which he had taken asylum. This was entirely natural, considering not only the intense feeling and political partisanship generated by any case touching slave property, but also that the conception of independent sovereignty of the several States quite generally prevailed. The most famous of such gubernatorial collisions was between Governor Seward of New York and Governor Gilmer of Virginia. The controversy illustrated Seward's aggressiveness of temperament because his contention was really *obiter*. An agent from Virginia appeared at Albany with a requisition for two negroes charged with stealing a slave. They were at the time in custody in New York. Seward deferred his formal answers to the requisition until his return from a short absence from the capital. Thereafter the prisoners were discharged on habeas corpus on the ground that "neither of them had committed an offence against the laws of Virginia." However, Seward in a letter to the Governor of Virginia "embarked in a discussion of the proper construction of the constitutional provision for the surrender of fugitives from justice, insisting that it applied only to offences recognized as crimes by the jurisprudence of all civilized nations, or to acts made criminal by the laws both of the State demanding and of that assenting to the surrender, and did not apply to acts which any one State chose to make highly penal, but which had no criminal significance in another, such as assisting in the escape of a slave, — an act inspired by the spirit of humanity and of the Christian religion."¹ Seward's argument is to be classed with many other strained constitutional constructions under the exigency of the "Irrepressible conflict." Happily the flagrant solecism of slavery in a nominally free government no longer exists to excuse or even demand causistical interpretation. The words

¹ Life of Seward, American Statesmen Series, by T. K. Lathrop, page 40.

of the Constitution are that a person "*charged in any State*" with crime, "shall on demand of the executive authority of the State from which he fled be delivered up," &c. The true construction of this provision is felicitously put in the opinion of Judge Andrews in *People ex rel. Lawrence v. Brady*:¹ —

"The word crime in the clause of the Constitution which has been quoted, embraces every act forbidden and made punishable by the laws of a State, and the right of a State to demand the surrender of fugitives from justice extends to all cases of the violation of its criminal law. *Com. of Kentucky v. Denison*, 24 How. (U. S.) 104. Felonies and misdemeanor offences by statute and at common law are alike within the Constitutional provision; and the obligation to surrender the fugitive for an act which is made criminal by the law of the demanding State, but which is not criminal in the State upon which the demand is made, is the same as if the alleged act was a crime by the law of both."

Another interpretation of the constitutional power of a demanding State has materially confirmed the efficacy of interstate rendition as a remedy. Up to the year 1893 a spirited judicial controversy existed on the question whether a fugitive surrendered for a certain offence could be tried in the demanding State for a different offence. The courts of different States were arrayed in favor of and against such right. The mooted point was finally authoritatively settled by the decision of the Supreme Court of the United States in *Lascelles v. Georgia*.² It was held that a fugitive from justice, who has been surrendered by one State to another State upon requisition charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, no immunity or exemption from indictment and trial in the State to which he is returned for any other or different offence from that designated in the requisition, without first having an opportunity to return to the State from which he was extradited. The decision of the Supreme Court was unanimous, and unquestionably it embodied the sound view. The argument against the right to try for a different offence was founded upon a supposed analogy between international extradition and interstate rendition. The court by justice Jackson, remarked:

"To apply the rule of international or foreign extradition, as announced in *United States v. Rauscher*, 119 U. S. 407, to interstate rendition, involves the confusion of two essentially different things, which

¹ 56 N. Y. 182.

² 148 U. S. 537.

rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the State to which the fugitive is returned."

It thus appears that the policy of interstate rendition as now settled contemplates that the States are not in any substantial sense independent sovereignties. The law of the demanding State alone determines whether a crime has been committed, and, once returned there, the prisoner may be tried for any other crime. Any person who has left a State after an offence against its laws may be surrendered, and the only immunity vouchsafed to the citizen against summary transportation to a distant forum is that he may require it to be shown that he had actually been within the demanding State and left it.

This latter point seems to be settled in the citizen's favor. The language of the Constitution and statute indicates that actual fugitives alone and not constructive fugitives were contemplated. Furthermore there has been an authoritative interpretation to such effect. In *Ex Parte Reggel*¹ it was said: "The appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the territory was not required by the Act of Congress to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that Act." I am inclined to concur in the opinion advanced by Mr. John Bassett Moore in his comprehensive and valuable work on extradition (section 590), which the learned

¹ 114 U. S. 642.

author fortifies by language of the Supreme Court in a later case,¹ that the language above quoted from *Ex Parte Reggel* does not necessarily call for the exaction of specific proof of flight before the governor of the State in which the prisoner is may constitutionally take any action. But certainly under the language of *Ex Parte Reggel* an alleged fugitive is entitled to have the question, whether he had been corporeally within the demanding State and left it, passed upon before he may be lawfully surrendered. There may be *prima facie* ground for action without specific allegations in the requisition papers that the person called for has fled from the demanding State, and even for final action if the question of flight is not put in issue. But, if the person apprehended does deny that he was corporeally within the demanding State at the time of the commission of the alleged offence, he has a constitutional right to have such issue passed upon by the governor in the first instance, and by the courts on habeas corpus, and is constitutionally entitled to be discharged unless it appear at least presumptively that he is an actual fugitive.

This rule that only an actual fugitive is extraditable is one to be broadly accepted and administered in practice according to its fullest and most radical scope. Any other rule would lead to grave injustice and grievous oppression. Take, for instance, the recent *Botkin* case, in which a conviction was secured in California. The theory of the prosecution was that Mrs. Botkin, the defendant, deposited poisoned candy in the mail in California directed to her victim in Delaware. Under the statute law of California the offence was triable there, and it accorded with common sense and convenience and was eminently just both to prosecution and defence that the trial should be had not at the technical locus of the crime, but at the place where the defendant was alleged to have performed the act that set the crime in motion. Suppose, on the other hand, that Mrs. Botkin had been under the law extraditable and had been transported to Delaware to answer the indictment. She would have been compelled, among strangers, it may be without means to adequately present her defence, to stand trial for a capital crime. If she wished to present evidence besides her own it might have been impracticable to procure the personal presence of important witnesses, and, herself a foreigner under suspicion, she might have been subjected to the prejudices of a local jury,

¹ *Roberts v. Reilly*, 116 U. S. 80.

necessarily sharing the popular indignation over the murder of a locally well known citizen. The following language from the opinion in *Ex Parte Smith*,¹ though uttered apropos of the duty of care in sifting evidence, will not be amiss in the present connection: —

“No case can arise demanding a more searching inquiry into the evidence than cases arising under this part of the Constitution of the United States. It is proposed to deprive a free man of his liberty, to deliver him into the custody of strangers, to be transported to a foreign State, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him, separated from his friends, his family, and his witnesses, unknown and unknowing. Had he an immaculate character it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis.”

A few years ago it was reported in the newspapers that a governor of the State of Texas proposed to demand the rendition of a citizen of New York, who had not been in Texas, for trial for the offence of violating the Texas anti-trust law, the gravamen of his offence consisting of acting as an officer of the Standard Oil Trust, whose principal office and base of operations are at the City of New York. It was said that the demand would not be made upon the State of New York — under repeated precedents there it would have been summarily refused — but upon another Southern State, in which the gentleman in question was in the habit of temporarily sojourning, and whose governor was reported to hold views of the law of extradition similar to those of the extraordinary executive of Texas. If this preposterous scheme actually was entertained it was snuffed out by widespread discussion. If its accomplishment had been attempted and the requisition had been honored by the governor upon whom it was made, doubtless the gentleman, who by constructive presence was alleged to have violated Texas law, would have been promptly discharged upon habeas corpus. When we consider the enormous possibilities of half-baked legislation in mining-camps prematurely erected into States, as well as the demagogic legislation adopted in many States old enough to know better, it becomes very obvious that if constructive presence were regarded as sufficient to authorize extradition, persons of conspicuous financial standing would be liable to very serious oppression on frivolous pretexts.

¹ 3 McLean, 121.

It has been remarked that the rule that only actual fugitives are extraditable should be respected and administered in its widest and most literal scope. Usually courts and judges have fully carried out this policy, but exceptions occasionally occur. In the North Carolina-Tennessee case above referred to, the Supreme Court of North Carolina is entitled to great respect for firmly administering the law although the result was practically most outrageous. Duty constrained the court to decide first that persons firing a shot in North Carolina, which took effect across the boundary line in Tennessee, could not be prosecuted in North Carolina because the technical locus was where the act took effect, and a duty just as clear afterwards compelled them to refuse extradition of the malefactors to Tennessee because they had not been within that State. From this latter decision two members of the Supreme Court of North Carolina dissented, their argument being that the theory of constructive presence of the murderers in Tennessee when the shot was fired from North Carolina must be consistently carried out, so that if they were constructively in Tennessee and had since actually been found in North Carolina they must have constructively fled from Tennessee and therefore be extraditable. This reasoning is fallacious because the extradition application was under Federal law, proceeding on general principles and independently of the State laws.

These dissents illustrate the judicial spirit sometimes cropping out to insure the doing of justice in an exceptional case, law or no law. Occasionally in interstate rendition cases judges whose judicial ideals are beyond reproach fall short of effectuating the constitutional rights of the citizen through following State law. It must be constantly kept in mind that interstate rendition rests on Federal law, and that such rights as the citizen possesses are secured to him by the Federal Constitution. The Federal statutory provisions, however, are very meagre, and there has naturally grown up a large volume of State jurisprudence both statutory and case. At a meeting of delegates to an interstate extradition conference, appointed by the governors of several States, held in New York City in 1887, a proposed statute was formulated and recommended to be adopted by Congress. Such act is comprehensive in its terms, prescribing practice and procedure as well as matters of substantive law; it apparently embodies the result of careful study and sound judgment, and might well be passed in order to secure uniformity throughout the Union. But,

until such a provision be made, State law from very necessity will continue to cut an important figure. It is well settled that the courts, State as well as Federal, have jurisdiction on Habeas Corpus to review the action of the governor surrendering a person for extradition to the agent of a demanding State. And in so doing State courts should administer Federal law primarily, administering State law only in so far as it aids in the effectuation of the spirit of the Federal law. An interesting case was passed upon at a Special Term of the Supreme Court in New York City in 1895, in which one of the ablest and most conscientious of the New York judges was in my judgment led into heterodoxy through the assumption that his power was limited by the narrow terms of a State statute.¹ Section 827 of the New York Code of Civil Procedure attempts to regulate the procedure upon Habeas Corpus in interstate extradition proceedings, and, as the learned judge points out, "according to the letter of the statute, at least, the only question which the court can determine is the question of the identity of the prisoner with the person against whom the charge has been made, or with the person named in the warrant of the governor." Accordingly, identity being clear, the writ was dismissed as to two persons, and their extradition to Massachusetts ratified, although it was made to appear presumptively that they had not been within that State at the time of the commission of the crime. Certain coupon bonds had been stolen in Massachusetts, and, although the relators who resided in New York City were shortly thereafter in possession of a part of the property, they claimed they had received it there from a woman called "Maggie" and undertook to dispose of it on her account. Very probably the relators had guilty knowledge, but the facts recited in the opinion make it even more probable that they had not been in Massachusetts. However this may be, the court declined to pass upon that question as immaterial. The following is from the opinion: —

"It would also seem that it must appear upon the papers that the prisoner is a fugitive from justice, in the sense that he was either present in the State at the time of the commission of the offence charged, or that the crime alleged is of such a character as necessarily to imply the presence of the prisoner within the State at the time it was committed. This excludes a certain class of crimes which may be committed by persons

¹ *People ex rel. Ryan v. Conlin*, 15 Misc. 303.

who are not at the time within the State whose laws have been infringed. To be a fugitive from justice, and therefore, subject to extradition, it must appear by proof or necessary inference that the prisoner was within the State at the time of the commission of the crime with which he is charged. If the papers upon which the governor's warrant is issued tend to show that the case is one coming within this definition, I do not think that the court has any power to try the question on habeas corpus whether the prisoners were, or were not, at the time the offence was committed, within the demanding State.

In the case at bar a large amount of proof has been taken tending strongly to show that the relators were not in the State of Massachusetts, but in this State, at the time when the bonds in question were stolen. But all of this is really matter of defence to the charge. Upon the trial of the charge in the State of Massachusetts, the commonwealth must make out its case by proving the commission of the theft in question by the relators; and the ground upon which they now seek to be discharged in this State is really the defence of an alibi, which should properly be made and proven upon such trial. It never could have been intended by the legislature, nor is it, I think, a matter of constitutional right with the relators, that such a question as this should be tried and determined in such proceedings as these. It has been repeatedly held that the court has no right upon a question of extradition to consider the charge upon its merits, or to undertake, in any way whatsoever, to determine whether it is well founded or not."

With the utmost respect, we think the position thus taken radically unsound. Non-presence would of course constitute the defence of an alibi to a prosecution in the Massachusetts courts, but, entirely distinct from this, under Federal and not State, law, in the language of *Ex Parte Reggel* (*supra*), each relator was "entitled according to the Act of Congress to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction." The correct view of this phase of the subject is well presented in a convenient little book on *Interstate Extradition* by John G. Hawley, Esq., of Detroit. The author says: —

"It is only in the courts of the State from which he is sought to be extradited that the accused can ever be heard upon this question (whether he is a fugitive). For, as we shall see hereafter, he cannot raise the question of the regularity or legality of his extradition in the State to which he is taken, upon his trial. To say, therefore, that he cannot be heard upon this question before he is removed, is to say that a

man can be deprived of a valuable right without any opportunity of being heard. But it is only in a plain case that a judge would be justified in discharging an alleged fugitive upon this ground. If there is a conflict of evidence, yet if there is sufficient evidence to justify the Governor or the court in believing that the prisoner is a fugitive from justice, he should be extradited. (*Re Kellar*, 36 Fed. Rep. 681; *Roberts v. Reilly*, 116 U. S. 80.)

"But if on the other hand it is made to appear clearly that the accused is not a fugitive within the meaning of the Constitution, he should be discharged. And upon this question of fact he is entitled to a full hearing." (*Jones v. Leonard*, 50 Iowa, 106; *Re Smith*, 3 McLean, 121; *Tenn. v. Jackson*, 36 Fed. Rep. 258; *Hartman v. Aveline*, 65 Ind. 344; *Wilcox v. Wolze*, 34 Ohio St., 520; *Re Mohr*, 73 Ala. 503.)

If judges of State courts, either because feeling constrained by the peculiar form of State statutes, or, for other reasons, do not effectuate the rights of an arrested person, under the Constitution and statutes of the United States, the proper remedy would seem to be to apply to a Federal judge for another writ of habeas corpus. The technical rule appears to be established that "a decision upon one writ refusing a discharge does not prevent the suing out of another writ from another court or officer."¹ In Mr. Moore's work on extradition (section 647) there is cited the instance of an arrested person, who, having been held for extradition by a State court, thereafter applied for a writ of habeas corpus to a United States court. The Federal judge arrived at the same conclusion as the State judge, holding the relator liable to extradition. The case is significant, however, as illustrating that Federal judges will entertain writs of habeas corpus for the discharge of prisoners although similar writs have already been discharged by State courts.

The rule is well settled that the Federal courts ordinarily will not interfere by habeas corpus to inquire into the restraint of liberty of a person under authority of a State, because alleged to be in contravention of the Constitution, laws, or treaties of the United States. The policy of the Federal courts in such cases is to permit a prosecution in the State courts to proceed to judgment, the prisoner being relegated to his right of raising any question of infringement of Federal privileges and immunities upon writ of error from the Supreme Court of the

¹ *Ex parte Kaine*, 3 Blatchf. C. C. 1; *Roberts v. Reilly*, 116 U. S. 80; *Re Mohr*, 73 Ala. 503; *Re Perkins*, 2 Cal. 474; *Re Ring*, 28 Cal. 247.

United States to review the determination of the Supreme Court of a State affirming his conviction.¹ Any other general policy would be out of the question, because prosecutions in State courts would be constantly embarrassed and delayed by Federal interference. At the same time the Federal courts have never renounced the right to issue writs of habeas corpus in exceptional cases, where immediate intervention may be essential for the upholding of whatever rights a relator may have under the Federal Constitution and laws.² It would therefore seem that there can be no question—even considering their general policy of non-interference—that Federal courts would be authorized to interpose and prevent the extradition of a person to a distant forum, if he has not been within the territorial jurisdiction of such forum. Furthermore, the ordinary rules regulating possible conflicts between Federal and State courts in criminal matters do not apply in the present connection, because interstate extradition is purely the creation of Federal law. There is not, therefore, a conflict between Federal and State law in the ordinary sense. In the question of extradition the only point involved is whether Federal law has been properly administered. Therefore a Federal court should have even less hesitation in nullifying the action of a State court upon a second writ in an extradition proceeding, than if the case were one where the criminal law of the State were expressly involved.

Wilbur Larremore.

¹ For two recent illustrations see *Baker, Sheriff v. Grice*, 18 Sup. Ct. Rep. 323; *Tinslay v. Anderson, Sheriff*, 18 Sup. Ct. Rep. 805.

² See authorities last cited.

LAW AND FACT.

THE practising lawyer who takes up Professor Thayer's book on Evidence¹ with the hope of finding it an index to the latest case law will be disappointed. The practical treatise is yet to come. But every earnest student is under a deep obligation to the author for the pains he has taken to "throw light on the beginnings and true character of our rules of evidence." It is clear that if the common law is ever to be fully systematized, the work must be done by specialists who, like Professor Thayer, are willing to devote years to the development of single topics. It long ago became impossible for any one lawyer to occupy the entire field of the common law, and even the judges who cross that field from one end to the other in the performance of their daily duties show signs of fatigue.

The author has handled roughly some of our cherished traditions and has set us all a-thinking. One tradition I am inclined to stand by, in spite of what is said to the contrary, namely, that the construction of a written instrument is a question of law and not a question of fact. The author's view is sufficiently indicated in this paragraph.

"It is not uncommon to call the interpretation and construction of writings 'a pure question of law.' That it is a question for the judge there is no doubt. But when we consider to what an extent the process of interpretation is that of ascertaining the intention of the writer—his expressed intention—irrespective of any rules of law whatever, and when we come to undertake the details of such an inquiry, it is obvious that most of this matter is not referable to law but to fact." (page 203.)

This conclusion may be right if the author's definition of law is right as we find it on an earlier page. "What then do we mean by law? We mean at all events a rule or standard which it is the duty of a judicial tribunal to apply and enforce." (page 192.)

It appears then that the construction of a written instrument may or may not be a question of law according as there is or is not

¹ A Preliminary Treatise on evidence at the Common Law. By James Bradley Thayer, LL.D. Boston: Little, Brown & Co., 1898.

a rule or standard already declared for the guidance of the courts in its construction.

For example, when the first court decided that "heirs at law" in a gift of personalty did not mean heirs at law at all, but something very different, that was a question of fact. When the second court decided the same point, that was a question of law because a rule had been established. When the third court decided that heirs at law in a gift of realty and personalty meant heirs at law, that was a mixed question of law and fact, because, although there was a rule of law, the court held that the rule was not applicable to that case.

I respectfully submit that the learned author's definition of law is inadequate, and that law, or what in our language passes for law, comprises every judicial decision which is so made and recorded as to become a precedent for future cases, whether the judge who made the decision had a rule for his guidance or not.

It is astonishing with what tenacity we cling to the notion that the administration of justice presupposes the existence of a body of law imposed upon the judges by some external force. We shake off the notion that law is the mandate of the sovereign only to substitute the mandate of society or the "social standard of justice" or some other unseen power. The idea that a body of picked men can administer justice and serve the ends of peace and security for which courts are established without being told what to do by some outsider cannot get a lodgment because our brains are pre-occupied by "law," and yet we see the workings of our courts of justice every day and our judges seem to be free agents except as they respect the decisions of other judges who have preceded them; and we feel just as secure under this system as if we were living under a code of forty volumes. If we feel reasonably certain that cases are going to be decided in the future as they have been in the past, what more do we need in the way of law?

Take a simple illustration. A man has two sons. The elder robs an apple-orchard. The father takes him in the act and applies the switch. The younger brother watches the operation. The father has never commanded his sons not to rob apple-orchards but the younger boy knows by long experience that the administration of parental justice is uniform. For the purpose of promoting good order in that family, that single case has all the effect of a positive command. If the father chooses to say as he wields the switch, "I am doing this because I do not approve of stealing," that

reason may indicate a little more clearly to the younger son just what path he must avoid in order to avoid the switch, but the connection between the act and the switch may be so obvious as to render explanations unnecessary.

Is it hard to conceive of a silent man at the head of a family meting out punishments and rewards in his court of justice so impartially and so judicially that his boys will be as well behaved and will know as well what they ought to do and what they ought not to do as if they were governed by a code of laws?

When Bentham wrote of "Sham Law," and "Spurious Law," and "Judge-made Law" and "Ex Post Facto Law" the bar was set against him partly because his manner was not conciliatory, but mainly, I fancy, because of a confusion in the use of terms. His statement that "in the domain of common law everything is fiction except the power exercised by the judge"¹ seems extravagant, but so far as it asserts that what we call the common law springs from the power of the judge to decide the case before him, it can hardly be questioned.

The sole power of the judge is to decide the case before him. But in deciding that case he has a right to respect the decisions of his predecessors, and that right becomes a binding obligation upon him when he sees that respect for precedents is all that separates order from chaos in the administration of justice.

Now when you have, first, a judgment, and secondly, respect for that judgment as a precedent, you have a first-rate substitute for law, and you secure in the course of time a much greater certainty in the administration of justice than you could get without precedents under the most voluminous code that was ever written.

How the lawyers and judges came to put the cart before the horse by assuming that law preceded judgment is a question for the black-letter men. It may be as Bentham intimates, that the judges adopted this device in order to lend a fictitious authority to their judgments. We can well imagine that it was easier for a judge to dispose of a disappointed suitor by saying: "Thus saith the Law," than by saying: "I have decided against you because that is my opinion of the merits of your case." It seems more probable, however, that "law" came to be used in a double sense because, as Bentham points out, "the individual decree has the effect of law, of a real law, issued by the legislator acknowledging

¹ Works of Bentham, iii, 223.

himself such and acknowledged as such." It is quite natural that two things which produce the same effect should be called by the same name, and it is only when we are looking at the cause instead of the effect that this poverty of language gets us into trouble. That it does get us into trouble at times there can be no doubt. For example, in assuming that it is the duty of the judge simply to declare and apply the law we are compelled to look for the outside source of supply. We go back as far as we can, and failing to find it, assume with Blackstone that it is prehistoric, and that all traces of it have been effaced except as they have been preserved in the records of the courts. And yet we know all the while that nine-tenths of our law has arisen within the last two hundred years, and that if we were to search the Year Books for an answer to the questions of law which our clients put to us, we should get no help whatever. The assumption too that the courts have any special mission to "declare the law" is contradicted in every volume of our reports. The courts are constantly enlarging, cutting down or denying altogether rules which have been stated in the earlier cases, and they do it with entire freedom.

Thus Gray, C. J., disposes of such rules by saying that they are "suggestions" made "by way of argument only and not of adjudication."¹

Again we hear one judge referring to the decision of another as an act of legislation, but where shall we find a judge willing to admit that he himself is legislating?

The fact is that in the sense in which any judge legislates every judge legislates, and he is compelled to legislate because he is bound to decide the case before him and so to establish a new precedent. Markby (*Elements of Law*, s. 26) calls attention to the provision of the French Code, which makes it penal offence for a judge to refuse to give a decision upon the ground of the silence or the insufficiency of the law. Without this statutory compulsion has any one ever heard of a common law judge who refused to render judgment, because there was no law applicable to the case? So long as the practice of reporting cases and using them as precedents continues, judicial legislation is not a usurpation of power. It is inherent in the strict performance of judicial duty.

We speak of the principles of equity as things which the early Lord Chancellors were accustomed to manufacture out of hand,

¹ *Hall v. Bliss*, 118 Mass. 560.

but we say that now this creative power is gone and that the principles of equity are as fixed and rigid as the principles of law.

It is the old case of the growing tree. You may stand and watch that tree for an hour and see no sign of growth, and yet you know that the tree is a good deal bigger than it was ten years ago and that the same vital force which drew that tree from the soil is now extending its branches. The apple-tree cannot grow back again into the ground and start as a pear-tree in some other part of the orchard. The growth of next year will be determined partly by the environment of soil and atmosphere and mainly by the condition of the present tree to which that growth must be added. The legislative gardener may potter about that tree and prune and graft. But as long as the tree lives it must grow.

But it was not necessary for us to wait for Sir Henry Maine¹ to tell us that judgment preceded law in primitive societies to learn that this is the true order of succession in our common law, for the reports show us precisely how our law is made.

Take a single illustration. In 1721 Reason and Trantor were put on trial for the murder of Lutterell. The prosecuting attorney called a clergyman who testified that Lutterell on his death-bed declared that as he was a dying man the defendants barbarously murdered him. A majority of the judges held that this evidence was admissible. The court gave no reasons, stated no rule, cited no precedents, but simply admitted the evidence. They were bound either to admit the evidence or to exclude it, and whether they ruled it out or in, they made a new precedent.²

Notice that in this case it appeared that Lutterell knew that he was dying. The court did not say that this circumstance was material and it was open to any future court to hold that it was material or immaterial. In 1789 that circumstance was held to be material in a case which called for a decision upon that precise point.³

Note also that the first case was the trial of men for the murder of the declarant. It was open to any future court to hold that this also was an immaterial circumstance, and to admit a dying declaration in civil cases, as coming within the "principle" of *Rex v. Reason*. But the later courts in fact held that this cir-

¹ Maine, *Ancient Law*, page 3.

² *Rex v. Reason and Trantor*, 1 *Strange*, 498; *Thayer's Cases*, 348.

³ *Woodcock's Case*, *Leach*, 500; *Thayer's Cases*, 354.

cumstance was material and so the rule as to dying declarations has come in the course of one hundred and fifty years to be formulated and defined, not because the courts have usurped legislative functions, but because each court has been compelled to answer yes or no to every question of evidence which has been properly presented, just as it must give judgment for the plaintiff or for the defendant in every case within its jurisdiction.

Why is it not as correct to say that the law of dying declarations has been made by the courts, as to say that a statute is made by the legislature? When James C. Carter,¹ discarding all other definitions, declares that law consists of "rules springing from the social standard of justice," what does he mean except that the judge like the legislator is a product of the soil? The legislator of to-day does not make such laws as were made two hundred years ago, because the state of society to which he belongs is different. But when we speak as lawyers and not as historians or philosophers, we say that the statute is made by the legislator and not that it is determined by the social standards of the time. The reason why we are so reluctant to say that our common law is made by the judge, is because of that old trouble with the word "law." We forget that since a judgment when used as a precedent "has the effect of a real law" to say that a judge makes the law is simply to say that he renders a judgment which becomes a precedent.

If then our law springs from our decided cases and from the use of cases as precedents, I know of no practical test of law as distinguished from fact except that it is that part of the case which the judge chooses to decide and to decide in such a way that his decision may be used as a precedent for future cases. In order that a case may be available as a precedent, it is necessary that not only the conclusion but the premises from which the conclusion is drawn shall be recorded. Any number of records showing simply that judgment was entered for the plaintiff or for the defendant would be of no value as precedents; and in precisely that way the verdict of the jury is always rendered. The jury may state their conclusions in detail as in a special verdict or may find generally for the plaintiff or for the defendant; but the premises upon which their conclusion is based are never stated, and so careful are we that the verdict of the jury shall not be used as a

¹ Address before the American Bar Association, August 21, 1890.

precedent, that when two successive juries sit in the same case pains is taken to prevent the second jury from learning the verdict of the first. Now it is entirely conceivable that in a rude state of society the jury might be left to settle the entire controversy between plaintiff and defendant, that the judge should exercise merely the function of a sheriff to preserve order in the court room. As a matter of fact, the judges have always insisted on taking a hand in the decision of the case.

Professor Thayer refers to the various devices by which judges have undertaken to decide questions which might otherwise have been left to the jury, for example, special verdicts, demurrers, new trials. By these means he asserts that the judges have been forever advancing upon the "theoretical province of the jury." After his patient examination of the history of jury trial he certainly has a right to speak with authority upon the question, what the theoretical province of the jury really is. But in referring to the various processes by which questions have been turned over to the court which might have been left to the jury, he has described the whole process of law making. For it is very certain that if everything had been left to the jury there would have been no law.

I respectfully dissent, then, from Professor Thayer's statement that "to be told that law is for the court and fact is for the jury enlightens us not at all as to the discrimination between law and fact." (b. 183.) That part of the case which is left to the jury is fact, as it seems to me because it is left to the jury; and that part which is decided by the judge is law because he chooses to decide it and to decide it in such a way that it shall be used as a precedent for future cases.

A jury for example decides that a man is negligent because he got off the train while it was in motion. A judge reaches the same conclusion from the same premises. Why is the conclusion in the one case fact and in the other case law? The jury and the judge are alike rational beings and have reached the same conclusion by the exercise of their reasoning faculties. What then is the distinction? I know of none except that the conclusion of the judge goes upon the record and every succeeding judge is bound to accept his conclusion as correct, while the second jury is not bound to accept the conclusion of the first jury and is not even permitted to know what that conclusion was. It may reach the same conclusion by accident, but not by precedent.

Undoubtedly judges decide many questions of fact. Not all

of their decisions become precedents. In many departments of their work they prefer "discretion" to precedent. Judge Wells refers to the question of the competency of an expert as a question "mainly of fact,"¹ meaning that within the limits of the discretion which is given to the judge, he is bound by no precedent and his decision makes no precedent for any future judge. Lord Esher says that an equity judge does not bind "his successors in the decision of questions of fact; it is decisions upon questions of law which are binding."² He suggests no test, however, for distinguishing law from fact, unless it be that in the one case the decision is and in the other case it is not binding.

No better proof of the saving grace of precedent can be found than in the vagaries of judicial discretion. Sentences for crime, within the limits of the statute, have always been left to the discretion of the judge and the inequality of sentences depending upon the mood of the particular judge has become so flagrant that the tendency of recent legislation is to take away this discretion and intrust it to the prison authorities. Those who have had occasion to observe the sentences imposed by our inferior courts for small offences will see the force of the opening sentence of a recent act: "When a convict is sentenced to the State Farm the court or trial justice imposing the sentence shall not fix or limit the duration thereof."³

Jabez Fox.

¹ *Commonwealth v. Williams*, 105 Mass. 62, 68.

² *In re Norman*, L. R 16 Q. B. D. 673, 675.

³ St. 1898, c. 443.

PATENT RIGHTS AND COPY RIGHTS.¹

AN author, musical composer, artist, or inventor has a natural right to the unlimited use and enjoyment of his literary, musical, or artistic creation, or of his invention. It is the duty of the State to recognize and protect this right, but the State does not confer the right.

Nor does this right depend upon whether the author, musical composer, artist, or inventor has property in his creation or invention. If he have such property, his right of use and enjoyment is, it seems, an incident of his right of property. But, though he have no right of property, yet he has the right² of use and enjoyment, because he can exercise such right without committing any wrong against any other person, and because no other person can prevent his exercising such right without committing a wrong against him.

As the literary, musical, or artistic creation of an author, musical composer, or artist is embodied in a chattel and as an author, musical composer, or artist is always assumed to own the chattel which embodies his creation, it follows that an author, musical composer, or artist owns his literary, musical, or artistic creation, regarded as a chattel, as absolutely as he can own any chattel. An invention, on the contrary, is incapable of being embodied, and therefore an inventor can have no ownership of his invention as a chattel. And yet an inventor has, for the reason just stated, as unlimited a right to the use and enjoyment of his invention as an author, musical composer, or artist has of his creation.

What means has an author, musical composer, artist, or inventor of preventing the use and enjoyment of his creation or invention by others? An author, musical composer, or artist has all the means which are given him by his absolute ownership and control of the chattel which embodies his creation; and he has no other means, unless upon some principle not yet indicated. The only means that an inventor has, on any principle yet indicated, of preventing the use and enjoyment of his invention by others is that

¹ The following paragraphs were prepared as a part of a lecture; and they are printed here, through the kindness of the Editor, instead of being read to the Class.

² Such right should, it seems, be classified as a personal right.

of keeping it secret; but this, of course, will be ineffective, unless the invention be of such a nature that its author can use and enjoy it without disclosing it to others.

Has an author, musical composer, artist, or inventor a property in his literary, musical, or artistic creation, or in his invention, regarded as an incorporeal thing? If he have, this will furnish him with another and effective means of preventing the use and enjoyment of his creation or invention by others without his consent. If such a property exist, it is not created by the State, but is deduced as a consequence of the creation or invention. If such a property does not exist otherwise, doubtless it might be created by the State; but it is believed that no State ever has created such a property.

That an author or musical composer has such a property in his creations before publication of them, using the term publication in its ordinary acceptation, is well settled by authority, and seems clear upon principle. And if such a property exists before publication, there seems to be no good reason why publication should put an end to it. Yet it must be, it seems, deemed settled by authority that such property ceases on publication, though whether because of publication, or in consequence of the expressed will of the Legislature, is not clear.

What has been said in the last paragraph of an author and musical composer seems to be true also of an artist, though there is a dearth of authority on this question in regard to artists.

As an invention cannot be embodied in a chattel, and so is incapable of ownership regarded as a chattel, so it is incapable of ownership regarded as an incorporeal thing. For an inventor to become owner of his invention would be like an author's becoming owner of the ideas expressed in his literary composition merely because he was the first to express them. It is a well-known fact that the same thing is often invented by different persons at nearly the same time and independently of each other; and shall the inventor who happens to be first in time deprive all subsequent inventors forever of the right to use their own inventions? Such a right in a first inventor would be intolerable, and would bear no resemblance to an author's musical composer's or artist's right of property in his own literary, musical, or artistic creation. Such a right as the latter imposes no restraint whatever upon other literary, musical, or artistic creations; and in fact it clashes with the interests of only one class of persons, namely, those who desire to reap where others have sown.

Are there no other means by which an author, musical composer, artist, or inventor may prevent the use and enjoyment by others of his creation or invention without his consent? Yes, the State may interfere in his favor by issuing its prohibition against the use of his creation or invention by others without his consent, and by arming him with the power to enforce such prohibition; and this is what the State does when it grants letters-patent to an inventor, or enacts a law for the protection of authors, musical composers, or artists. The right thus secured to the inventor by letters-patent is a monopoly in the true sense; for it makes unlawful, except to one or a few, what, but for such letters-patent, would be lawful to all. The right thus secured by law to an author, a musical composer, or an artist may also be termed a monopoly in the strict legal sense; for such laws always assume that authors, musical composers, and artists have, after publication, no property in their creations, regarded as incorporeal things, and they confer a right which is wholly independent of any such property.

The right thus conferred by letters-patent, or by law, may properly enough be termed incorporeal property; but it is incorporeal property of a peculiar kind, being wholly negative in its nature, and it is therefore radically different from an author's, a musical composer's or an artist's property in his literary, musical, or artistic creations, regarded as incorporeal things.

It follows from what has been said that if letters-patent be granted to two or more persons as joint inventors, the only right conferred upon them is that of preventing the use and enjoyment of the invention by others; no right is conferred upon them as against each other, and therefore each of them may use and enjoy the invention, without accountability to the other, as if the letters-patent had been issued to him alone.¹ And the same thing must be true of two or more joint creators of any literary, musical, or artistic production, so far as regards the right conferred upon them by statute; but it is otherwise as to any property which authors, musical composers, or artists have in their creations, for such property, being positive and affirmative in its nature, is subject to the ordinary rules of property owned by several persons jointly or in common.

There is another important distinction between the affirmative

¹ *Mathers v. Green*, 34 Beav. 170; L. R., 1 Ch. 29, s. c.

right which an author, a musical composer, or an artist, has in his unpublished literary, musical, or artistic creation, and the negative right which is conferred by letters-patent upon an inventor, or by statute upon an author, a musical composer, or an artist, whose literary, musical, or artistic creation has been published, namely, that, while the former will be recognized and protected throughout the civilized world, the latter can have no existence, except within the jurisdiction of the sovereign by whom the letters-patent were issued, or the statute was made; and a consequence is that the publication of a literary or musical creation, designed for representation on the stage, is more likely to be a source of pecuniary loss than of pecuniary profit to its author or composer.

C. C. Langdell.

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A CORRECTION. —

MARCH 14, 1899.

DEAR MR. EDITOR, — As soon as our mistakes are irretrievable, they stand forth to our sight flamboyant. By a perversion which wronged my memory I made George Herbert say: "Who sweeps a room as in Thy cause," instead of "as for Thy laws." Will you let me make the correction now, and oblige,

Yours very truly,

O. W. HOLMES.

THE LATE LORD HERSCHELL. — The late Right Hon. Farrer Baron Herschell devoted to the service of England and of the common law a mind accurate, clear, and profound, made doubly precious by its tireless energy. His career covered a period of nearly half a century, including service as barrister, Member of Parliament, Solicitor General, and twice as Lord Chancellor during the last ministries of Mr. Gladstone. The nervous strain of this long period of unresting labor told so greatly on his strength that it was with foreboding that he accepted his position on the Anglo-American Commission, in which last service he died, deeply mourned here and in England. The Supreme Court of the United States adjourned in reverence to his memory.

To his profession Lord Herschell gave the fullness of a firm and mathematical mind. His opinions, though at times prolix, are accurately and logically developed, lucid in their treatment of intricate states of fact, convincing in their exposition of the law. His power, his conscientious deference to tradition, his determined conviction, are aptly illustrated by his repeatedly quoted opinion in *Allen v. Flood*. His manner when hearing causes was at times strangely impatient, almost arrogant, carrying to the extreme the forensic method of arguing with the counsel. A similar unbending sternness led to his determined refusal while Lord Chancellor

to make political or family appointments to the Bench, scrupulous in regard to appointments even to the County Court Bench.

A Hebrew by birth, Lord Herschell was the third of his race and generation to do illustrious service to the law. Jessel, Benjamin, and Herschell have all impressed their genius on the character of the common law, enriching it with their learning. Lord Herschell disclaimed his right to the name of scholar, but his great labors attained results often profoundly scholarly. His heart was with the cause of legal learning, and he actively aided the Selden Society, and the Society for the Study of Comparative Legislation. He had a lively interest in the Harvard Law School, and in the last autumn spoke with enthusiasm of the hope that he might soon address the school. To this end plans were being entered into at the time of his death. This interest of his brings back with greater force to us a sense of personal loss.

THE ASSETS OF A DEFUNCT CORPORATION.—The Queen's Bench Division in Bankruptcy has recently decided that choses in action in the form of money claims held by a corporation against a bankrupt, survived the dissolution of the corporation which owned them, and passed to the Crown as *bona vacantia*. *Re Higginson and Deane*, 79 L. T. Rep. 673. The case marks an abandonment of one ancient rule, and a rigid enforcement of another doctrine of the severest common law. It is not a new idea to abandon the one rule, and to say that a chose in action of a corporation does not die with it; upon the dissolution, then, the chose in action must be treated like any other personalty, and no doubt the common law held that all personalty of a defunct corporation belonged to the Crown. A corporation, unlike a natural person, has no legal successor. This unfortunate rule is changed in all of our States by statutes providing for the appointment of a receiver, who in various ways is given the power to use all property for the payment of debts and to distribute the residue among the shareholders. In the absence of statute, or in cases not covered by the statute, courts of equity have taken a hand in modifying the law. They have in effect imposed a trust upon all the corporate property for the benefit, first, of creditors, and second, of shareholders. This trust can be enforced whenever the court can control either the holder of the legal title or one who, like a receiver, has power to deal with it. *Bacon v. Robertson*, 18 Howard, 480; *Wood v. Dummer*, 3 Mason, 308. The relief thus afforded is subject to two important limitations. The court will not disturb a *bona fide* purchaser for value. *Powell v. No. Missouri R. R. Co.*, 42 Mo. 63. It cannot command a person over whom it has no power. *Lewin, Trusts*, ninth ed., 28, 29. Under this last head the principal case must fall. The Crown or the State cannot be sued, nor can it be held to the performance of a trust; and against it the shareholders and creditors can have no remedy.

A few cases have gone a step beyond the limits here laid down. *Lenox v. Roberts*, 2 Wheat. 373; *Bacon v. Cohea*, 20 Miss. 516. A corporation, before dissolution, assigned a note without indorsement to a purchaser, and the purchaser was allowed to recover upon it in equity after the dissolution of the corporation. It is not clear whether these courts took the view that the note survived the death of the corporation or not. If the legal claim simply became extinct, the court was doing a bold act, but yet an act within its powers, in creating a new claim in

equity for the benefit of the equitable assignee. If, on the other hand, the legal claim survived, the conclusion is inevitable that the legal title passed to the State; and although the assignee may have had a legal power of attorney, irrevocable because coupled with an interest, to sue in the name of the assignor, the court had properly no right to allow him to sue in the name of the State when the State had obtained the title. Only upon the first view can these cases be supported; but even if they are supported upon the second view they do not go to the length of enforcing a trust against the State; the exercise of the legal power of attorney by the assignee would call upon the State for mere inaction, not for any positive action. In the principal case the creditors and shareholders could not compel the Crown to yield to their claims; that would be in effect compelling the Crown to act as trustee. But it is important to note that their equitable claims still existed, and that the Crown was morally bound to recognize them; the creditors and stockholders might well succeed by petition to the Crown.

CONVEYANCES IN CONSIDERATION OF SUPPORT.—In dealings between father and son there is often a lack of that careful regard to self-interest that marks ordinary business transactions, and in conveyances in consideration of support there is frequently a disregard of the most ordinary precautions. Cases of misplaced confidence have caused the courts much anxiety, and have led to the adoption of some very doubtful principles of law.

In *Payette v. Ferrier et al.*, 55 Pac. Rep. 629 (Wash. Sup. Ct.), a father conveyed his farm to his son in consideration of the son's promise to support him during life. After faithfully performing for a time, the son mortgaged the premises, and a few years later refused to perform further. The father filed a bill to have the property returned to him, and as the mortgagee knew all the facts the court ordered a reconveyance. The authority on the point is slight. All the cases date back to *Reid v. Burns*, 13 Ohio St. 49 [1861], which had for its sole authority a case where the reconveyance was decreed for fraud, and where the failure to support was a mere incidental fact. *Tracy v. Sacket*, 1 Ohio St. 54.

All the cases tend more to stating results than to giving reasons. The argument rests mainly on grounds of natural justice: that pecuniary damages are inadequate to compensate for the loss of the son's personal service; that nothing less than a right to revest the whole estate will give adequate protection. The result reached appeals to one's sense of justice. Can it be supported in principle? The conveyance is absolute. The parties do not think of possible default, for if they did a mortgage would certainly be taken as security. No condition or trust is contemplated and none is expressed. How, then, can the father retain any interest in the land? If the son had contracted to pay an annuity for life in return for the land, the transaction would be regarded as a sale, and the father would have a continuing vendor's lien on the land for the payment. 2 Dent, Vendors and Purchasers, 6th ed. 830. Why is not this also true in the principal case? The price of the land is the support for life. This view probably would support all the cases so far decided, for they have all been cases where the property was small in value, and where the whole sum that could be realized by a sale would probably be inadequate to insure the father's support in the future. In decreeing a reconveyance

direct the courts perhaps adopt an arbitrary way of reaching the result, for usually a vendor's lien only gives a right to have the property sold and the proceeds distributed. If, however, the value of the property is considerably less than the lien claim, the lienor can safely bid the property in for himself, as he will afterwards receive back all the purchase money. So when the father asks the court for a reconveyance, that relief is no more than a short cut to the proper result. Were the property much greater in value than the claim, a reconveyance would be hard to justify on the above principle, because of the son's right to the surplus. This question, however, has not yet come before the courts. In recent years the practice of granting some form of equitable relief on default by the son has become more common, and it now seems likely to find a permanent place in our law. It is to be hoped that soon its fundamental principles will be defined, and the doctrine placed on a sound basis.

THE RIGHTS OF A BENEFICIARY UNDER A CONTRACT. — In most American jurisdictions a beneficiary not a party to a contract may always sue; in England and in some few of the United States such a beneficiary can never sue. In New York a beneficiary can sue by exception where lineal relationship exists between promisee and beneficiary. In New York also there is the rule of *Lawrence v. Fox*, 20 N. Y. 268: when a promise looks to the satisfaction of a claim of a third party against the promisee such a quasi-beneficiary may sue. All of this law was involved in a recent decision of the New York Court of Appeals. The defendant entered into a contract with the husband of the plaintiff whereby the husband was to aid the defendant in overthrowing a clause of a will; and in event of success the defendant was to pay the wife, the plaintiff, \$50,000. The husband gave the required assistance; the will was broken; but the defendant refused to pay. Upon appeal, the court by a vote of four to three allowed the plaintiff to succeed. *Buchanan v. Tilden*, 52 N. E. Rep. 724.

The majority insisted that the wife was within the exception of near relationship; and further the majority seem to decide that the obligation of the husband to support the wife enabled her to sue. As to the first reason: that idea is to be traced to the decision in an ancient case that a child might sue upon a promise made to its father for its benefit. *Dutton v. Poole*, 1 Vent. 318. The proposition of that case, although overruled in England, has survived in New York. The further step now taken by the majority in assimilating the case of husband and wife to the case of parent and child would be a fair one if the doctrine of the exception had any basis in theory or in policy; but such does not appear. So the court might well have refused to extend it. As to the second reason: the case did not come within the rule of *Lawrence v. Fox*, *supra*. The obligation of the husband to support the wife was not a claim upon which an action could be brought; nor did the promise look to the discharge of that obligation. *Durnherr v. Rau*, 135 N. Y. 219.

Now upon any modern conception of a promise and of a contract the one to whom the promise is made and from whom the consideration moves has alone the legal right to sue. And yet the rule allowing a beneficiary to sue reaches a most just result. In such case one looks to equity. In equity the rights of most beneficiaries are seen to be recognized and enforced. Why not of these beneficiaries? And if the beneficiary were allowed a bill for the specific performance of the promise in his behalf

against promisor and promisee an adequate remedy would be provided. There would then be an end of the illogicality and circuitry now attending the actions of the beneficiary at law. Again, the rule of *Lawrence v. Fox*, *supra*, allowing a creditor to sue upon a promise made to the debtor to pay the debt, is likewise indefensible in theory, just in effect, and referable to equity. For, by creditor's bill the creditor might well enough proceed against debtor and obligor to secure the benefit of the obligation as a valuable asset of the debtor. It is, then, to be regretted that the principal case only adds to the confusion as to the rights of the beneficiary at law and suggests no solution of the general problem.

SMUGGLING DEFINED. — When a penal statute describes a crime by a single word, the definition of that crime will be for the courts. So under United States Revised Statutes, § 2865, as to the crime of smuggling, — an authoritative definition of that crime remained for the United States Supreme Court at the present sitting. *Keck v. United States*, 19 Sup. Ct. Rep. 254. A package of diamonds intended to be smuggled was seized by a revenue officer in the stateroom of a steamer after she was moored at her dock. Upon appeal, the court, by a vote of four to three, held these facts insufficient to justify a conviction upon an indictment for smuggling, as the goods were not actually unladen and brought past the barrier of the customs without payment of duties. The minority insisted that the act of smuggling was complete when the goods were brought within the waters of the port with intent to land them without payment of duties. This difference of opinion is natural, for no provision of the statute delimits the crime. Smuggling, indeed, has a well accepted import in English law. The English revenue statutes from an early date have distinguished between smuggling — the act of landing goods unlawfully — and the various acts which might precede or follow it. But in the United States the revenue statutes, until 1842, forbade all such acts indiscriminately, and made no mention of smuggling by name. The main argument of the majority has then much force: that the present statute of 1842, by providing, in a separate clause paraphrasing the English statute, for the punishment of smuggling as the “clandestine introduction of goods,” thereby adopted the English definition. *United States v. Dry Goods*, 17 How. 85. But further, the construction of the minority fails to stand the test of the most familiar canon governing statutory interpretation, that all the provisions of the law must be read as a whole. The view of the minority is then seen to involve a fatal dilemma: although they contend that the offence was complete the moment the concealed goods arrived within the waters of the port; yet they are obliged to concede that, under the statute, if the duties were subsequently paid before passing the customs, no offence would have been committed. This contention and this admission are wholly irreconcilable. If a subsequent act becomes necessary to determine whether an offence has been committed, it cannot be said in reason that the offence is at first complete. For it is fundamental in criminal law that all the elements of a crime must co-exist, and that when a crime is thus complete nothing subsequent can purge it. The decision reached by the majority in the principal case is, then, most sound statutory construction. Nor is there any practical argument the other way. The acts done in the principal case were punishable under the revenue laws had the indictment been rightly drawn. But as the law stood they did not constitute smuggling.

REQUIREMENTS FOR ADMISSION TO THE COLUMBIA LAW SCHOOL. — It is with considerable satisfaction that we note the change which has been made in the requirements for admission to the law school of Columbia University. From and after the term year beginning 1903-4 none will be admitted who has not received a Bachelor's degree from an approved college; and now the law school of Columbia takes its stand beside the law school of Harvard as an essentially graduate department. This change is not to be looked upon as a mere matter of form, nor is it open to the charge of Philistinism. It simply amounts to a recognition of what is becoming the logical development of a university, — a college leading to a number of co-ordinate graduate departments. The fact that the law is of sufficient dignity to be entitled to graduate rather than undergraduate work cannot admit of question. In making this change Harvard and Columbia do not condemn as having no place in the community the schools which teach law to all comers; that question is for them irrelevant — the relevant question is, what place the law must occupy in the university. As the university develops, a neutral department is becoming impossible; the law department must take a step, either backward among the undergraduates or forward among the graduates; it cannot invoke the fiction of law and remain "*in nubibus*" or "*in gremio legis*." At Harvard and Columbia the time has come in which some step had to be taken, and no one can say that the choice has not been wisely made.

With this change it is obvious that a change has come over the significance of the degree conferred by these law schools. The class which graduates this year from our law school and the first class to graduate under the new régime at Columbia will for the first time in their respective schools present themselves as candidates for a graduate degree, — a degree which among foreign universities would rank as a doctor's degree. The form of words by which that degree is known may remain unchanged; but it is a matter for serious consideration whether the development of the university, which is in substance co-ordinating the graduate departments, does not require that the forms of the degrees conferred by these graduate departments be also co-ordinated, and that the degree conferred by the law department take its formal stand beside the degrees of the medical and graduate schools. The essential fact, at all events, has been accomplished; the change in substance is already made.

MERE WORDS AS PROVOCATION. — An intentional homicide, if with reasonable provocation, is manslaughter, not murder — that distinction remains in nearly all the modern statutes — but the question of provocation has always been a troublesome question of fact for a jury. In the older law the judges constantly limited that difficulty, and sought consistency in verdicts by laying down collateral rules in regard to it. If there was "cooling time," there was no provocation; "mere words" were not provocation. Such rules of thumb received judicial recognition. *Lord Morley's Case*, Kel. 1, 53, then passed current in the cases and text-books. But changes in public opinion toward the criminal law have affected these two collateral rules as to provocation, — the first, with the phrase "cooling time," has fallen into disuse, the second is constantly questioned. In a recent case, *State v. Grugin*, 47 S. W. Rep. 1058, the Supreme Court of Missouri held that a charge that words could not be considered provocation was wrong. In that case it appeared that the

prisoner was informed that his infant daughter had been ravished, some weeks before, by his son-in-law. He went to the house of the ravisher and demanded an explanation. When the latter answered him defiantly, the father shot twice and killed him. Here was clear "cooling time," and no further provocation save the defiant reply, but it was finally held that all the facts should have gone to the jury on the general question of reasonable provocation.

The opinion of the court is clear and convincing; it is supported by a few strong modern cases, notably *Mayor v. People*, 10 Mich. 212, and *Reg. v. Rothwell*, 12 Cox C. C. 145. The authority against the decision practically reduces to a number of *dicta* which reiterate the formula, "mere words are not a provocation," and exemplify a legal habit of depending on unconsidered maxims; but the point seems to have been directly raised only in *Reg. v. Rothwell, supra*. Few will disagree with the result of the principal case. It is for just such a case that the arbitrary mechanical rule of the old law is obviously unfit. Here the mere words were but the "last straw," the crowning taunt; to treat them as a separate species of provocation and make a separate rule about them is irrational, — more, it is belittling the intelligence of the jury. And surely it is most important for the dignity of the law that, in regard to the most serious and notorious of crimes, its judgment should keep step with public opinion.

REVOCATION OF AGENCY BY DEATH OF THE PRINCIPAL. — By the civil law all acts of an agent performed within the scope of his authority before he has notice of the death of his principal are binding on the deceased's estate. But at the common law the opposite rule prevails, both in England and in America. And the cases hold that the death of the principal creates an instantaneous revocation of authority, unless the power of attorney be coupled with an interest. *Davis v. Windsor Savings Bank*, 46 Vt. 728; *The Farmers' Loan & Trust Co.*, 139 N. Y. 284.

Deweese v. Muff, reported in *The Central Law Journal*, Feb. 30, 1899, seems to attempt to fasten an exception on this general rule. The payee of a note indorsed it in blank, and gave it to his agent for collection. In ignorance of the subsequent death of the principal, the maker paid to the agent a balance due on the note. The representative of the payee repudiated this payment on the ground that the authority to collect had been revoked by death, and sought to recharge the maker. The Supreme Court of Nebraska sustained a peremptory instruction to return a verdict for the defendant. It reasoned correctly enough that, as the note was properly indorsed by the payee, it was not necessary for the agent to collect or receive money in his principal's name. The maker would clearly be protected after payment to any one who came within the tenor of the promise. But apart from the law of negotiable paper, the court added this further discussion. Although, it said, as a general rule the death of a principal instantly terminates the agency, still, where one in good faith deals with an agent in ignorance of the death of the principal, the representatives are bound if the act done is not required to be performed in the principal's name.

This *dictum* is interesting as showing an attempt to break away to a certain extent from the rigorous principle of the common law which unquestionably often works hardship. It may be reasoned that the general

rule must apply to foreign as well as to domestic agents,—and representatives abroad are often required to negotiate transactions of great importance without the possibility of knowing whether the death of their principal has revoked their authority; that accordingly the practical purposes of trade and commerce might, perhaps, be furthered by the more equitable rule of the civil law. But cannot it be said in answer to this argument that those who deal with an agent knowingly assume the risk that without notice his authority may be revoked by operation of law? And is not the accepted doctrine of the common law one of sound good sense, in perfect conformity with the law of agency? That system rests fundamentally on the theory that the agent is identified with the principal; that the act of the servant is the act of the master. Nothing surely can be the principal's act which is done after his death.

THE BENEFICIARY OF A CONTRACT NOT A CESTUI QUE TRUST.—In the case of *Moore v. Triplett*, Supreme Court of Appeals of Virginia, Virginia Law Register, Vol. IV., page 681, it appeared that a debtor transferred land to a purchaser in consideration, *inter alia*, that the purchaser promised to pay certain of his debts. The purchaser failed to perform his promise. It was held that, apart from the personal liability on the contract, the land conveyed was subjected to a trust for the debts, and that the trust might be enforced against a grantee who took the land from the purchaser without giving any consideration. The decision seems clearly wrong. The purchaser entered into a contract to pay debts. He intended a liability to the person he contracted with,—to no other. The performance of his side of the contract would benefit the original creditor, but that is no reason for giving the creditor a hold on the contract. The case goes much further than to allow a beneficiary to sue on a contract to which he is not a party; it declares the purchaser a trustee of the consideration he received, and makes the beneficiary a *cestui*. But the purchaser had no idea of placing himself under a liability to the beneficiary, no idea that he was putting himself into the jaws of equity at all. The court held that because he assumed a legal liability he should be held to an equitable one as well, so laying a burden upon him without reference to any demand of conscience or to any misconduct. The practical result of this decision was that the third party beneficiary of the contract got a lien on the assets of the purchaser which no creditor of the purchaser could get. Yet the position of that beneficiary in the transaction was that of a mere volunteer, for whom equity should take no step.

The decision of the principal case is not law in any other jurisdiction, and rests on no authority. The fundamental distinction which the court disregard, and the importance of it, are perhaps most aptly illustrated by certain partnership cases. If the joint property in a partnership is assigned, at dissolution, to one of the partners upon trust to pay the firm debts, it must be appropriated for that purpose. See Ames, *Cases on Partnership*, p. 218, note. If, however, the property is assigned to him in consideration of his promise to pay the firm debts, and the whole transaction is in good faith, it has been held, *Howe v. Lawrence*, 9 Cush. 553, that the property has become the separate estate of the single partner, and liable for his individual debts.

PENALTIES, LYNCH LAW, AND THE CONSTITUTION.—In the time of King Canute, if a person was killed and his slayer escaped, the ville was obliged to pay the crown forty marks for his death. Under the Norman kings the people of the hundred were answerable, for robberies committed within their limits, to the persons damaged. 1 Reeves, Hist. of Eng. Law, 11, 213. Now the State of Ohio, with the intention of blotting out lynch law, has gone one step farther and enacted that the next of kin of a person killed by a mob may recover from the county a fixed sum of \$5000. This statute was held unconstitutional in *Mitchell v. Champaign Co.*, 5 Ohio Nisi Prius 158, on the ground that it deprived the inhabitants of the county of their property without due process of law. On appeal to the Circuit Court this judgment was reversed. See Central Law Journal, Feb. 3, 1899. The court say that the act, if considered merely as giving the next of kin compensation, is bad in that it arbitrarily fixes the amount of the loss at \$5000; but that in fact it simply imposes a penalty in the interests of public order and is therefore valid. This reasoning leaves open one rather doubtful question. Granting the \$5000 is a penalty, can it legitimately be allowed to go to the next of kin instead of to the state?

Many cases have upheld statutes which gave the right to recover actual damage suffered at the hands of a mob. *Darlington v. Mayor of New York*, 31 N. Y. 164. *Chicago v. Manhattan Cement Co.*, reported in Chicago Legal News, Feb. 25, 1899. (Ill. Sup. Ct.) But in these cases there was a moral claim for compensation on the part of the next of kin, and this claim extended to the whole sum recovered. In the principal case the damage might be far less than \$5000. On what principle could the difference be recoverable? Taxation imposed to recompense for the actual injury in such a case might stand; but taxation for the benefit of an individual who has no legal or moral claim is clearly bad. If the test be whether the legislature could properly by taxation raise \$5000 from a county to pay a person whose claim is, say, \$1000, then this act falls. But this is not the true light in which to look at the matter. The question is not whether the state could raise money for this purpose by taxation nor whether the state, having got the money, could spend it in this way. The question is whether, as an ordinary police measure, allowing the next of kin through the courts to take \$5000 from the county is such an arbitrary exercise of legislative power as amounts to a deprivation without due process of law. Due process of law includes both deprivations by such legislation as has been recognized in the past as within the scope of legislative power, and also any legislation which looks to the general welfare of society and is not arbitrary or irrational. The practice of centuries shows the legislature may impose penalties to secure order. It has always been customary to allow recovery for injury by lawlessness. At least one case, identical in facts with this, has held the statute void. *Gunter v. Dale Co.*, 44 Ala. 639. And if we look at the act as a practical working attempt both to inflict punishment and at the same time to give a measure of compensation, it is hard to consider it arbitrary legislation. The individual's interest insures the county's being promptly brought to account. The fixed sum avoids the delay and the expense incident to an inquiry into damages, and payment to this recipient will increase the distastefulness of the punishment to the offenders. It might too be said that, even as informers take half the fine, the individual here gets the money partly as a reward for prosecuting. The remedy is certainly effective, and it seems on the whole well within the power to legislate for the good order and welfare of the community.

RECENT CASES.

BILLS AND NOTES — ALTERATION — PAYMENT. — The plaintiff certified a draft which had been raised from \$76 to \$7660, and subsequently paid it, having at the time of payment the means of knowing that the draft had been altered. *Held*, that the plaintiff is not entitled to recover the amount so paid. *Continental Bank v. Tradesman's Bank*, 55 N. Y. Sup. 545 (Sup. Ct., App. Div., First Dept.).

The court declines to discuss the effect of the certification, but argues that the plaintiff is not entitled to recover here in any event, having negligently paid the draft. But the mere fact that an acceptor negligently pays over money which the holder would otherwise be entitled to retain is not a sufficient reason for refusing to allow him to recover. Negligence in the mistaken payment of money is not necessarily a bar to recovery. *Appleton Bank v. McGilvray*, 4 Gray, 518. The decision might well have been placed upon the principle that, as between two innocent persons, one of whom must suffer, the legal title shall prevail. It must be admitted, however, that the Court could not consistently adopt this principle in view of the decisions which have allowed the drawee of a bill to recover where he has paid an altered bill without negligence, and which, however unsound in principle, seem to have established the law. *Bank of Commerce v. Union Bank*, 3 N. Y. 234.

BILLS AND NOTES — ASSIGNMENTS — INDORSEMENT. — Upon the back of a promissory note payable to his own order the defendant signed a writing which read: — "I hereby assign and transfer to F, all right, title, and interest that I may have in the within note." *Held*, that defendant is liable to a subsequent holder as an ordinary indorser. *Citizen's Nat. Bank v. Walton*, 31 S. E. Rep. 890 (Va.).

It is held in a majority of the American jurisdictions, as in the principal case, that the holder of a negotiable instrument who writes upon it an assignment of all his interest incurs all the liabilities of an ordinary indorser. *Markey v. Corey*, 108 Mich. 184; *Sears v. Lantz*, 47 Iowa, 658. It is argued in these cases that since a mere signature of the holder upon the back of a negotiable instrument gives to a subsequent rightful holder an authority to complete an indorsement in the name of such transferor, a signature with the added words of assignment can have no less effect. But this reasoning seems fallacious. The plain import of the language is that the transferor shall stand in the position of an assignor merely. The words of assignment exclude any implication of an authority to make him an indorser. A different construction subjects him to liabilities he has expressly indicated he did not intend to undertake. *Spencer v. Halpem*, 62 Ark. 595.

BILLS AND NOTES — FORGED CHECK — PAYMENT BY DRAWEE BANK. — Plaintiff bank, the drawee of a check, paid it to the defendant, an indorsee for value in due course. At the time both parties were ignorant of the forgery of the drawer's signature. *Held*, that the plaintiff cannot recover the money paid. *First National Bank of Marshalltown v. Marshalltown State Bank*, 77 N. W. Rep. 1045 (Iowa).

The court considered the general doctrine that the drawee bank was precluded from recovery because it was conclusively presumed to know the signature of its depositors too narrow and placed their decision on the ground that present business conditions demanded the result reached. The principle was established in a case before Lord Mansfield. *Price v. Neal*, 3 Burr. 1354. His reasoning appears to discover the true ground of the doctrine. He argued that the defendant, having obtained the money should keep it unless it be against conscience for him to do so; that such is not the case when he has given value for the instrument in good faith, and then there is no reason for shifting the loss from one innocent man to another. Whatever the reasoning, the result of the principal case is law everywhere and it can be fully justified on the ground that as between equal equities the legal title should prevail. See 4 HARV. LAW REV. 297.

BILLS AND NOTES — INFANCY OF MAKER. — *Held*, that an infant can be sued by the payee on a note given for necessaries. *Melton v. Katzenstein*, 49 S. W. Rep. 173 (Tex., Civ. App.).

The principal case has the support of the weight of authority in this country. *Earle v. Reed*, 51 Mass. 387; *Dubose v. Wheddon*, 4 M'Cord, 221. The argument on the other side, however, seems sounder in principle. Even where an action is allowed against the infant on his contract for necessaries the prevailing rule restricts recovery to what the goods are reasonably worth. *Earle v. Reed*, *supra*. The result is an anomaly in procedure and indicates that the true nature of the infant's liability for necessaries is

quasi-contractual. That the question of consideration is open in the principal case is no answer to this suggestion, for in an action on the contract recovery should be the contract price irrespective of the amount of consideration given. Hence it seems that no action on the note should be allowed against the infant maker. *Williamson v. Watts*, 1 Camp. 552; *Fenton v. White*, 4 N. J. Law, 111; *Ayers v. Burns*, 87 Ind. 245.

CONSTITUTIONAL LAW — FOREIGN CRIMINALS — HABEAS CORPUS. — A sheriff, acting under the authority of the state of Idaho, was conducting a criminal, there convicted, from one to another part of that state. In so doing it was necessary to pass through the state of Washington. While in the latter state the criminal applied for his release on *habeas corpus* on the ground that he could not lawfully be detained there. *Held*, that such a discharge from the custody of the Idaho sheriff cannot be thus obtained, since to release the applicant would be violative of Const. U. S. art. 4, § 1, requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." *In re Maney*, 55 Pac. Rep. 930 (Wash.).

There seems to be no authority on the question. It is clear that if a criminal of one state has fled into another he cannot be taken in the latter state by an officer acting under the authority of the former. *Cf. Bromley v. Hutchins*, 8 Vt. 193. Resort must be had to extradition proceedings by a demand on the governor of the second state. 1 Bishop, *New Criminal Procedure*, § 219. However, it is difficult to see why the reasoning of the principal case would not extend the clause of the constitution to such a case and allow such a taking. It seems one thing to say that a judgment shall be given full faith and credit, and another to say that it shall be enforced as in the state where it was given. The former meaning extends to a prohibition to deny its binding validity; for instance, that the title to certain land is in A. This is clearly within the intent of the constitution. But the latter meaning would render all the judicial process of one state as effectual in another state as in that from which it issued. The facts of the principal case bring it rather within the latter meaning. A contrary decision would not have denied that the conviction was a subsisting and valid one. *Cf. Lemmon v. People*, 20 N. Y. 562.

CONTRACTS — BENEFICIARY. — The defendant entered into a contract with the husband of the plaintiff whereby the husband was to aid the defendant in overthrowing a clause of a will; and in event of success the defendant agreed to pay the plaintiff \$50,000. All conditions were performed but the defendant refused to pay. *Held*, that the plaintiff may recover the \$50,000. *Buchanan v. Tilden*, 52 N. E. Rep. 724 (N. Y.). See NOTES.

CONTRACTS — FAILURE OF CONSIDERATION. — A father conveyed a farm to his son in consideration of the son's promise to support him during life. The son mortgaged the premises and refused to support the father. *Held*, that the father is entitled to a reconveyance free from the mortgage. *Payette v. Ferrier*, 55 Pac. Rep. 629 (Wash.). See NOTES.

CORPORATIONS — BANKRUPTCY — DISTRIBUTION OF ASSETS. — In the bankruptcy proceedings in regard to the firm of Higginson and Dean, it was shown that the Royal Bank of Liverpool had been a creditor of the firm, but that the Bank had been since dissolved. *Held*, that the claims of the defunct Bank pass to the Crown as *bona vacantia*. *Re Higginson & Dean*, 79 L. T. Rep. 673. See NOTES.

CORPORATIONS — ULTRA VIRES CONTRACTS — JUDGMENTS. — A bill in equity was filed by a corporation and some of its stockholders to set aside a judgment by consent, obtained in an action against the corporation on an *ultra vires* contract. *Held*, that the relief prayed should be granted, although collusion on the part of the corporate officers in consenting to the judgment was not proved. *Great Northwestern Central Ry. v. Charlebois*, [1899] App. Cas. 114 (P. C.); s. c. 26 Canada Sup. Ct. Rep. 221.

The effect, as *res judicata*, of a judgment against a corporation on an *ultra vires* contract is a difficult and undeveloped subject. Where the judgment is the judicial decision of an actual contest, the corporation and stockholders surely ought to be concluded thereby. Otherwise, questions of *ultra vires* would never be settled. Where the judgment is by consent, it may not possess the same character of finality. Indeed, it has been held that any judgment obtained by agreement of the parties, although effective as an estoppel so long as it stands, may be vacated for any cause which would vitiate the agreement by which it was obtained. *Huddersfield, &c. Co. v. Lister*, [1895] 2 Ch. D. 273. If this be law, and if it be beyond the powers of a corporation to consent to judgment on an *ultra vires* contract, the principal case would be correct. But it is surely within the legitimate scope of corporate business to determine whether any defence, including that of *ultra vires*, can successfully be raised in a pending action. Authority is curiously lacking on the precise point. If the entering

of judgment were a mere device on the part of the officers of the corporation to validate an *ultra vires* contract, the judgment would clearly be open to attack. *Cf. Nevil v. Clifford*, 55 Wis. 161. The somewhat analogous case of a judgment against a married woman has caused much diversity of opinion. 1 Black on Judgments, §§ 54, 55.

CRIMINAL LAW — COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY. — A statute forbade the prosecution in a criminal case to comment on the failure of the defendant to testify in his own behalf. *Held*, that it is not error if the court make such comments. *Regina v. Rhodes*, [1899] 1 Q. B. D. 77.

Under a similar statute, *held*, it is reversible error for the prosecuting attorney to make such comments, even though the court subsequently instructed the jury to disregard them. *State v. Marceaux*, 24 So. Rep. 611 (La.).

The cases are of course distinguishable, but it cannot be doubted that the English case would not be followed in this country. All remarks of the court in criminal cases as to the credibility of witnesses and the weight of evidence, while allowed in England (see remarks of the court in the principal case), are in this country grounds for a new trial. *State v. Parker*, 66 N. C. 624; *Robinson v. State*, 24 So. Rep. 474 (Fla.). It seems that the English case deprives the prisoner of the protection which the statute was intended to give him, but since the case did not come under the words of the statute, the court refused to take from the presiding justice the power of supervision which is allowed in England. 1 Thompson, Trials, 209, 210.

CRIMINAL LAW — PROVOCATION — MERE WORDS. — The deceased ravished the prisoner's daughter. When upbraided by the prisoner he made a taunting reply, and the prisoner killed him. *Held*, that the question whether such words constituted a reasonable provocation should have been left to the jury. *State v. Grugin*, 47 S. W. Rep. 1058 (Mo.). See NOTES.

CRIMINAL LAW — SMUGGLING. — Diamonds intended to be smuggled were seized by a revenue officer before they were actually brought ashore from the ship. *Held*, that these facts will not justify a conviction for smuggling. *Keck v. U. S.*, 19 Sup. Ct. Rep. 254. See NOTES.

CRIMINAL LAW — STATUTORY OFFENCES REQUIRING NO INTENT. — The defendant was indicted, under a statute, for selling adulterated milk. He proved that the milk was adulterated while being delivered, by some unknown person not in his employ and without any negligence on his part. *Held*, that this is no defence. *Parker v. Allen*, [1899] 1 Q. B. D. 20.

It is well settled that statutory offences of this sort, being mere breaches of police regulations or torts against the public, require no criminal intent. *Com. v. Farrer*, 9 Allen, 489; *Com. v. Weiss*, 139 Pa. St. 247. *Contra*, *Teague v. State*, 25 Tex. App. 577; *Mulreed v. State*, 107 Ind. 62. No intent being necessary, the only question is, whether the defendant did the criminal act, and if he sold the article in an adulterated condition, as in the principal case, it would seem immaterial how the article came to be in that condition. A previous English case has held the defendant liable when the condition of the article sold was due to acts of the defendant's employees, although done against his express orders. *Brown v. Foot*, L. T. N. s. 649. The principal case goes further than any previous decision, but it is correct on principle. See 12 Amer. Law Rev. 469.

EVIDENCE — CHARACTER — CIVIL SUIT. — The deceased, while crossing the defendants' tracks, was struck by a train, the only eye-witnesses being the engineer and fireman. In an action to recover damages for causing the death, *Held*, that evidence that deceased was a careful man, and had previously used this crossing with due care, is admissible on the issue of his contributory negligence. *Missouri Pac. Ry. Co. v. Moffatt*, 55 Pac. Rep. 837 (Kan., Sup. Ct.).

A rule of evidence excludes the use of general reputation or actual character as a basis of inference to conduct. *Missouri, &c., Ry. Co. v. Johnson*, 48 S. W. Rep. 568 (Tex.). Some courts admit an exception where there are no eye-witnesses to the accident, on the ground that it is the best evidence to be had. *Chicago, &c. Ry. Co. v. Clark*, 108 Ill. 113. Even in such cases the evidence is equally open to the true objection, namely, that it is too slight and conjectural, and tends to prejudice the minds of the jury. That one must bring the best evidence he can, and that if he does it is enough, was a useful principle in the last century, when the law of evidence was forming. It has now outgrown its usefulness, and may be considered obsolete as a working rule. Therefore, where the above-mentioned exception has become established, it seems better to confine it to the letter, and to exclude the evidence when there are any eye-witnesses to the accident. Consequently the principal case might better have been decided the other way. See 12 HARV. LAW REV. 500.

EVIDENCE — MALICE — TESTIMONY OF PARTY. — In an action on an attachment bond for maliciously suing out an attachment, defendant was not allowed to testify that in suing out the attachment he had no ill will or malice. *Held*, that the testimony was rightly excluded. *Hamilton v. Maxwell*, 24 S. Rep. 679 (Ala.).

Although "malice in law" is merely the negation of justification or excuse, yet even if the defendant acted without probable cause, he still has an excuse if he did not act in bad faith. *Mitchell v. Jenkins*, 5 B. & Ad. 588; 14 Law Quarterly Review, 130. It is therefore material to determine whether he entertained ill will at the time of the attachment. Alabama has held that parties should not be allowed to testify to uncommunicated motives of their own conduct. *Hening v. Skaggs*, 62 Ala. 180. However, the general doctrine in such cases is that direct testimony of intention should be received. *Jefferds v. Alvard*, 151 Mass. 94. It is true that the evidence is subject to grave suspicion, but this should go simply to determine its weight and not its admissibility. Now that parties to an action are allowed to testify, none of the excluding rules forbid the introduction of such testimony, and it would seem better to admit it and leave its worth to be determined by the jury.

LIFE INSURANCE — ASSIGNMENT OF POLICY — INSURABLE INTEREST. — *Held*, that a valid policy of life insurance may be assigned to a person having no insurable interest in the life of the insured. *Steinback v. Diepenbrock*, 52 N. E. Rep. 662 (N. Y.).

Contracts of insurance entered into by persons who have no insurable interest in the life of the insured are regarded as wagering contracts and therefore void on grounds of public policy. But the authorities generally support the principal case and hold that a policy valid in its inception may be assigned to one without such interest. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24. Some jurisdictions have held that the same public policy that invalidates a contract of insurance made by one who has no insurable interest invalidates the assignment of a policy to such person. *Carpenter v. U. S. Life Ins. Co.*, 161 Pa. 9; *Price v. Supreme Lodge K. of H.*, 68 Tex. 361. And these cases have the support of a *dictum* of the Supreme Court of the United States in *Wamock v. Davis*, 104 U. S. 775. The tendency of the recent decisions in these States, however, is to hold the assignment valid, but to consider it, whenever possible, as having been made for purposes of security merely, thus compelling the assignee, after satisfying his claim, to hand over the proceeds of the policy to the representatives of the insured. *Schonfeld v. Turner*, 75 Tex. 324.

PROPERTY — ADVERSE HOLDING — INTERRUPTION OF POSSESSION. — During the occupancy of a tenant in adverse possession of land the premises were sold at a tax sale and conveyed by the vendee to the demandant, but the actual possession was undisturbed. *Held*, that this was not an interruption of the adverse holding. *Harrison v. Dolan*, 52 N. E. Rep. 513 (Mass.).

Though there are few decisions as to the effect of tax sales upon the continuity of adverse possession, the better view seems to be that they act as an interruption. *Davis v. Collins*, 43 Fed. Rep. 31. The present case suggests the other view, that a mere change of title without interruption of actual possession, in order to break the continuity, must be one that puts it where it is above the Statute of Limitations, as in the sovereign. For example, forfeiture to the State, for taxes or otherwise, of land held in adverse possession is an interruption of the adverse holding, although the actual possession is undisturbed. This is because the Statutes of Limitations do not generally run against the State, and, therefore, the moment the State obtains its legal title, there is a breach in the continuity of possession. *Armstrong v. Morril*, 14 Wall. 120; *Braxton v. Rich*, 47 Fed. Rep. 178. The present case is undoubtedly correct, however, as by the old rule of the common law, in force at that time in Massachusetts, but since changed by statute, the purchaser at the tax sale, not being in possession, could convey no valid title to the demandant as against the tenant. *McMahan v. Bowe*, 114 Mass. 140.

PROPERTY — ASSIGNMENT OF LEASE — COVENANTS. — A lessee for years of real estate agreed to convey his interest to the plaintiff, who entered on the land and paid rent directly to the lessor. *Held*, that the plaintiff is not entitled to enforce a covenant made by the lessor to the lessee, his executors, administrators and assigns. *Friary, &c. Breweries v. Singleton*, [1899] 1 Ch. D. 86.

The propriety of the above decision can scarcely be questioned. The situation of the parties is, however, a novel one, and there appears to be very little authority on point. It has been decided that an equitable assignee of a lease is not liable to the lessor on the lessee's covenants. *Cox v. Bishop*, 8 De G. M. & G. 815. The plaintiff in fact cannot stand in the relation of a tenant to the defendant although he has been paying him rent, for there is still an unexpired term in the original lessee. While there is no legal relation between the parties, the plaintiff is justly entitled to the benefit of the lessor's covenant. His appropriate remedy is in equity by obtaining an actual assignment of the lease.

PROPERTY—BOUNDARIES—HOUSES.—The grantor described a boundary line as "commencing twelve and one-half feet east of said house." *Held*, that in absence of evidence to show a contrary intention the distance is to be measured from the foundation of the house. *Kendall v. Green*, 42 Atl. Rep. 178 (N. H.).

The court treats the question as one of fact, purely, and seeks the intention of the parties, taking judicial notice of the "uniformly recognized practice of men to measure boundary lines on the ground." That both the treatment of the question and the result reached are correct can hardly admit of a doubt. *Centre St. Church v. Machias Hotel Co.*, 51 Me. 413. In an early case the opposite view was taken, the court apparently thinking that whenever a building is described as a base of measurement the edge of the eaves is the line of demarcation. *Millett v. Fowle*, 62 Mass. 150. When a house is described as itself the boundary, or when it is conveyed, the line is established by the edge of the eaves, but it is clear that these cases rest on grounds of their own, and do not warrant the laying down of a general rule of construction.

PROPERTY—FIXTURES.—One V, in possession of land under a contract to purchase from the plaintiff, allowed the defendant to erect thereon a small building, agreeing that it should be regarded as personalty and removable at defendant's will. The contract for the purchase of the land was rescinded. *Held*, that the defendant may remove the building, although as between the plaintiff and V it had become part of the realty. *Brannon v. Vaughan*, 48 S. W. Rep. 909 (Ark.).

The question which is here presented, has often been raised between a chattel mortgagee and the mortgagee of the land, when the chattel has been annexed to the freehold subsequently to the execution of the real estate mortgage. The authorities are very much in conflict whether or not a special agreement between the chattel mortgagor and mortgagee will prevent the chattel from becoming subject to the mortgage of the realty. *Cf.* in accord with principal case, *Tift v. Horton*, 53 N. Y. 380; *Crippen v. Morrison*, 13 Mich. 23. *Contra*, *Bass Foundry v. Gallentine*, 99 Ind. 525; *Hunt v. Bay State Iron Co.*, 97 Mass. 279. The principal case has adopted the juster view. No good reason is apparent for depriving the defendant of his security in order to bestow upon the plaintiff an advantage which he has not bargained for or in any way relied upon. *Cf.* *Davenport v. Shants*, 43 Vt. 546.

PROPERTY—FIXTURES—CONDITIONAL SALE.—In a contract for sale of chattels intended to be annexed to the soil, it was stipulated that the title should not pass until the price was fully paid. The chattels were annexed, but the price was not paid as agreed. *Held*, that the seller may assert his title as against a subsequent mortgagee of the land for value and without notice. *W. T. Adams Machine Co. v. Interstate Building & Loan Assn.*, 24 So. Rep. 857 (Ala.).

There is a direct conflict of authority on this point. Some jurisdictions hold, in accord with the present case, that such an agreement in a sale of chattels preserves their character as personalty, and that the subsequent mortgagee gets no interest in them although they are annexed to the realty. *Ford v. Cobb*, 20 N. Y. 344; *Warren v. Liddell*, 110 Ala. 232. Another view is that even though the chattels under such an agreement are annexed to the freehold after the mortgage of the realty, the mortgagee gets a title to them paramount to that of the original vendor. *Clary v. Owen*, 15 Gray, 522. The better doctrine would seem to be, however, that the mortgagee of the realty in such case should be allowed to hold all fixtures which would naturally pass as incident to the realty, and upon consideration of which he, in good faith, advanced his money; but that the original vendor should be allowed to prevail where the chattels were annexed after the mortgage of the realty, or where the mortgagee did not advance his money on faith of their passing under the mortgage. *Davenport v. Shants*, 43 Vt. 546.

PROPERTY—GIFTS MORTIS CAUSA—DELIVERY.—A wife, on her deathbed, directed her husband to deliver all her property to her nephew. *Held*, that this was a valid gift *mortis causa* of personal property then in possession of the husband, and constituted him trustee for the nephew. *Caylor v. Caylor's Estate*, 52 N. E. Rep. 465 (Ind.).

The general rule is that delivery is essential to every valid gift of chattels. It is settled, however, in the case of gifts *inter vivos*, that possession in the donee at the time of the gift is not a fatal objection, and, in accord with the principal case, some jurisdictions extend the doctrine to gifts *mortis causa*. *Southerland v. Southerland*, 5 Bush, 591. The authority, nevertheless, is decidedly the other way. *Drew v. Hagerty*, 81 Me. 231; *Cutting v. Gilman*, 41 N. H. 147; *French v. Raymond*, 39 Vt. 623. The latter cases argue that the general policy of the law is against gifts *mortis causa*, and that all rules regarding them should be strictly enforced. This seems a sufficient ground for requiring an actual delivery at the time of the gift. Delivery

may be regarded as performing a function similar to execution in the case of a will, and a relaxation in the rules requiring this solemnity is a departure from the safeguards which the law has placed around all acts of a testamentary nature.

PROPERTY—LOSS OF LIEN.—*Held*, that one who has a lien upon live stock for its keep does not lose his lien by levying an attachment upon the stock. *Lambert v. Nicklass*, 31 S. E. Rep. 951 (W. Va.).

There is singularly little authority upon the question here decided. Of the three cases which are directly in point, two, *Jacobs v. Latour*, 5 Bing. 130, and *Legg v. Willard*, 17 Pick. 140, are in agreement with, and the other, *Arrendale v. Morgan*, 5 Sneed, 703, is contrary to the principal case. It seems that sound reasoning requires a different conclusion than is here reached. That possession is a necessary element to the existence of a lien is fundamental. *Forth v. Simpson*, 13 Q. B. 680. But the lien-holder gives up possession of the goods when he permits them to be taken on attachment, and the possession of the sheriff is equally distinct from the previous possession of the lien-holder, whether the attachment is made at his or at a third party's suit. In the former case, as in the latter, the sheriff is not the agent of the attaching creditor, but is acting as the representative of the law, nor is anything gained by saying that the view taken as to the necessity of the lien-holder continuing in possession is technical, since it is based upon the fundamental conception of the nature of a lien.

QUASI-CONTRACTS—LEASE—ASSIGNMENT—LIABILITY OF SUB-LESSEE OF ASSIGNEE.—An assignee of a term made a sub-lease to defendant, who covenanted to pay out of the rents and profits the rent accruing to the superior landlord. The original lessee, having been compelled to pay to the lessor rent which accrued while defendant was in possession, brought this action against the latter to recover the amount thus paid. *Held*, that the action cannot be maintained. *Bonner v. Tottenham, &c. Society*, [1899] 1 Q. B. D. 161.

If the defendant had been an assignee of the term instead of a sub-lessee, plaintiff would have recovered. *Moule v. Garrett*, L. R. 7 Ex. 101. There, however, the lessor would have had a direct remedy against defendant on the covenant which would have run with the land. Both plaintiff and defendant being bound to the lessor, the former would be regarded as a surety for defendant, and entitled to a surety's remedies against him. The actual case is different, in that there was no privity of contract or estate between the original lessor and defendant; so that in England defendant incurred no liability at law to the former. Defendant's contract was made with his own lessee to discharge the latter's obligation to the superior landlord. In many of the United States, the beneficiary in such a case would be allowed to sue at law. Where that rule prevails the present case would seem to fall within the principle of *Moule v. Garrett, supra*. According to the best American authorities, however, the landlord is not permitted to proceed at law, but he is entitled, in equity, to the benefit of defendant's promise, and may enforce specific performance thereof. *Keller v. Ashford*, 133 U. S. 610. To the lessor's right in this regard the plaintiff, on paying the rent, would be subrogated. That very equitable and just doctrine has never been squarely adopted in England, and the principal case is especially interesting because of a *dictum* that some such remedy may exist.

TORTS—GRATUITOUS BAILMENT—DUTY OF CARE.—The defendant lent his steam engine gratuitously to the plaintiff, without knowledge of any defect in it. The boiler of the engine burst and plaintiff was injured. *Held*, defendant is not liable for negligence in not finding out the defect, and informing the plaintiff of it. *Coughlin v. Gillison*, [1899] 1 Q. B. D. 145.

The case follows the English authorities. *Blackmore v. Bristol Railway*, 8 E. & B. 1035; *MacCarthy v. Young*, 6 H. & N. 329. The line seems to be sharply drawn, that in the case of gratuitous lending, the bailor is not liable unless he has knowledge of the defect, while if the bailment is for hire, the bailor must use due care to find hidden defects. *Hyman v. Nye*, 6 Q. B. Div. 685; *Fowler v. Locke*, 7 C. P. 272. The law in this country, as regards bailments for hire, seems to agree with the English doctrine. *Horne v. Meakin*, 115 Mass. 326; *Hadley v. Cross*, 34 Vt. 586; *Windle v. Jordan*, 75 Me. 149. It is very probable that the principal case would be followed also, but there is very little authority on the point. See Schouler, Bailments, 3d ed., § 79; 5 HARV. LAW REV. 222.

TORTS—NEGLIGENCE—LAW AND FACT.—*Held*, that where the evidence is not contradictory, proximate cause is a question of law to be determined by the court and not a question of fact to be submitted to the jury. *Schwartz v. Skull*, 31 S. E. Rep. 914 (W. Va.).

It is often difficult to determine whether the application of a given rule of law to the facts is for the court or for the jury. If the rule of law is clearly defined and the appli-

cation of the facts to it comes within the general experience of mankind it is usually held to be for the jury. Such a rule, for example, is the ordinary rule of due care. *Bridges v. The North London R. R. Co.*, L. R. 7 H. L. 213. If, however, the rule is not clearly formulated, and if the definition, as far as it can be given, is difficult for those untrained in law to understand and so is liable to great misuse, as in the case with the rule of proximate cause, the application is for the court. *Pike v. Grand Trunk R. R. Co.*, 39 Fed. Rep. 255. The question whether the facts in a case come within a given rule of law, is however, always a question of fact, be it for the jury or for the court, and never a question of law as the court in the present case seem to consider it. See 4 HARV. LAW REV. 147.

TRUSTS—COLLECTING BANK—FOLLOWING TRUST FUNDS.—X deposited a draft with bank A for collection, which sent the draft to Bank B, its correspondent. Bank B collected it, credited the account of bank A with the amount, and after bank A became insolvent paid the proceeds of the draft to the receiver. *Held*, that X is entitled to the proceeds. *Guignon v. First Nat. Bank*, 55 Pac. Rep. 1051 (Mont.).

The decision is sound and finds support in numerous authorities. *Com. Nat'l Bank v. Hamilton Nat. Bank*, 42 Fed. Rep. 880; *Henderson v. O'Connor*, 106 Cal. 385; *Com. Bank v. Armstrong*, 148 U. S. 50. Ordinarily, payment by the sub-agent bank will change the relation between the agent bank and the depositor from that of trust to one of debtor and creditor. But the clearest principles of justice prevent the bank from assuming the position of a debtor to its depositor after its known insolvency. *Mfg'r's Nat. Bank v. Continental Bank*, 148 Mass. 553.

TRUSTS—EQUITABLE ASSIGNMENTS—NOTICE TO TRUSTEES.—A *cestui que trust* of personalty assigned his interest, the assignee giving notice of his claim to all the trustees then in office. Subsequently the trustees were changed. The *cestui que trust* then fraudulently executed a second assignment of his interest, and the second assignee brought his claim to the knowledge of the new trustees before they had heard of the first assignment. *Held*, that the first assignment has priority over the second. *In re Wasdale*, [1899] 1 Ch. D. 163.

It has long been a well established doctrine in England that the assignee of an equitable interest in personalty must give notice to the trustees of the legal title in order to render his claim secure. *Dearle v. Hall*, 3 Russ. 1; *Foster v. Cockerell*, 3 Cl. & F. 456. It has been further held that security, gained for the time being by notice to one of several trustees, may be lost by the death or retirement of that trustee from office, if a later incumbrancer is the first to bring his claim to the knowledge of the surviving trustees. *Timson v. Ramsbottom*, 2 Keen, 35; *In re Hall*, 7 L. R. Ir. 180. The tendency of these decisions, designed for the protection of subsequent incumbrancers who have acted in good faith and with due care, seems opposed to the holding in the principal case, for after a complete change of trustees the second incumbrancer, at the time of his transaction, is equally unprotected whether all or merely one of the original trustees were informed of the first assignment. The restriction here placed upon the doctrine of *Dearle v. Hall*, *supra*, appears arbitrary rather than logical. Yet the result reached is in accord with a sound principle that of two conflicting equities against the same person the one prior in time should prevail.

REVIEWS.

SELECT CASES IN THE COURT OF REQUESTS. 1497-1569. Edited for the Selden Society by I. S. Leadam. London: 1898. pp. viii, 257.

The appearance of this latest volume of the publications of the Selden Society emphasizes a change that has gradually come about since, in the first volume, Professor Maitland wrote that (the aim of the Society being the publication of materials for legal history) a critical description of the manuscripts used would be a sufficient introduction. In the present volume the Introduction is half the work, and much the more important half. It is a capital introduction, and we are glad to have it; but we should also welcome a volume chiefly filled with "materials for legal history,"—the long-promised second volume of "Select Pleas of the Crown," for example.

This volume illustrates another tendency of the society, the publication of matter of little legal value, though interesting to a student of the constitutional history of England. Since this volume appeared we know a good deal more than before about that obscure body, the Court of Requests; we know something more about the life of common people in the Tudor period; but we do not know a particle more about the history of English law. Perhaps the rolls of the King's Courts alone would inform us, and the Society cannot be constantly occupied with those rolls.

The Court of Requests was the "poor man's court" of equity, the civil side of the Star Chamber. It took its procedure from the civil law, and sent out commissions to magistrates to take testimony. In the files of the court is a mass of testimony, taken on interrogatories, parts of which form the most valuable portion of the records here published.

The court is chiefly of importance as having been involved in a quarrel as to jurisdiction with the Common Pleas and the King's Bench; a merry war of injunction and prohibition marked the reign of James, and the court finally fell with the first Charles. The apologist for the Court of Requests was the great lawyer, Sir Julius Cæsar, for many years a Master of Requests. He derived the jurisdiction of the Court from the Privy Council, of which it claimed to be an offshoot. The King in Council, according to this opinion, still had plenary power to establish new courts by a process that reminds one of the budding and the cellular growth of polyps. The common lawyers, on the other hand, held that all courts must be by custom, statute, or ancient grant, and that the Court of Requests was an unconstitutional novelty. "The Judges of the Court of Whitehall," said the Common Bench, "have none authoritie either to sitt there or to comitt any man from thence." Coke discharged on Habeas Corpus one held for contempt of the Requests, and ordered him to bring an action for false imprisonment. Notwithstanding this double severity, the Requests continued to grow in the sunshine of court favor, and only fell with the fall of Prerogative at the civil war.

The most important cases of which the records are here published had to do with the efforts of tenants to establish against their lords the ancient customs of manors. The disorders of the War of the Roses and the dissolution of the monasteries seriously wrenched the land-laws. Manors lost alternately their freehold and their copyhold tenants, until every occupant was treated by his lord as a tenant at will, and the lord was likely to be able to defend such treatment in a court of law. The Court of Requests was regarded as more favorable to tenant rights; and though in the cases here reported the Court seems to have found no method of modifying the law to the tenant's advantage, it exercised a persuasive influence over the landlords, and thus to an extent ameliorated the plaintiff's woes.

The other cases seem not to be important. Mr. Leadam's editorial work, as has been said, gives strength and character to the volume.

J. H. B.

A SKETCH OF ANNE ROBERT JACQUES TURGOT. By James M. Barnard. Boston. 1898. pp. 63.

Mr. James M. Barnard, of Boston, a gentleman much interested in the improvement of instruction in the law schools of our country, has recently presented to our law library a valuable sketch of Turgot, with various comments upon his character and public services. It contains a letter of

Turgot to Dr. Price of England, written in March, 1778, communicating suggestions as to our American constitution of that period. Naturally enough, he fails to observe the real aim of our revolution, and judges us as if we were trying to ground our constitutions on first principles, instead of merely applying to better advantage our inherited outfit of English ideals. But, nevertheless, these are the comments of a great and wise man, and we have reason to thank the kind friend that has made them accessible to us in the attractive little pamphlet above mentioned.

J. B. T.

BOUVIER'S LAW DICTIONARY. RAWLE'S REVISION. VOL. 2—J. to Z. By John Bouvier. A new edition by Francis Rawle. Boston: The Boston Book Co. 1897. pp. 1254.

To approach a law dictionary in its entirety on criticism bent does not at first blush strike one as an inspiring task. The high reputation of this standard work and Mr. Rawle's success with his previous edition of it, however, nerve the critic for the attack, and fortunately the study proves happier than the promise. There is much to please the general reader, much entertainment in this book, though its existence, of course, is excused only by its utility. It is unnecessary to add anything by way of general criticism to the review of the first volume of the present edition which will be found in 11 HARVARD LAW REVIEW, 420. It is possible, however, to consider this second volume in some of its details.

The dictionary is very complete. It would be difficult to hit on any topic which could properly be found in a law dictionary which is not discussed in this book. Not only are technical and "law words," if the expression may be permitted, defined, but words of ordinary use are taken up from the lawyer's point of view. For instance, the word "milk" might be omitted, not unreasonably, from a law dictionary. On page 411, however, "milk" is defined to be by weight of adjudicated cases skim milk, and the general American statutes providing for its inspection are considered. Quaint and almost forgotten legal terms, too, are discussed. Examples of these are "Tour d'Échelle" or the old right existing in certain parts of France of resting a ladder on your neighbor's wall, and "sworn brothers," which treats of formal covenants of friends to share each other's fortunes.

Important legal topics are discussed with a broad comprehension and with logical plan. When possible, the derivation of the word is given, then its short meaning, then its established legal significance, — as, for example, Baron Alderson's classic definition of negligence (p. 478), — then a general discussion of the whole subject embraced by the heading, including many citations by way of authority and illustration. The discussions of "mental suffering," "tort," "partnership," "libel," and "malice" struck the writer as especially helpful. There is much more than mere definition; there is enlightened consideration in accord with advanced but generally accepted legal ideas.

Certain other details deserve to be noticed. There are no less than forty pages of legal maxims briefly defined and supported by authorities; brief summaries of the constitutions and general laws of all the States of our Union; a list of the leading English and American reports with their abbreviations and the periods they cover; and discussions of statutes of present and historical importance such as the Thelusson Act and *Quia Emptores*.

The citations in the dictionary are full, comprising, of course, both English and American cases, and are brought strictly down to date. Many 1898 cases are to be found. It is gratifying to write that among the authorities cited the HARVARD LAW REVIEW figures not once or twice, but frequently throughout the entire book, and not only in respect to its leading articles, but through its notes and recent cases as well.

R. L. R.

A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE. By Charles Fisk Beach, Jr. Third edition. By John J. Crawford. New York. Baker, Voorhis, & Co. 1899. pp. cxxxiii, 702.

The main value of Mr. Beach's book on Contributory Negligence has been, as was intended, as an office tool. It contented itself with showing clearly the actual state of the law on contributory negligence and the application of it in the various situations where the question has arisen. It was clear and firm in its explanations, copious in citations, characterized by good sense, in all a most useful book. A new edition of such a work is then important, because the value of it to the practicing lawyer lies largely in the fact that it is a complete statement of the law he is working under. This new edition has attempted, apparently, to do just one thing—to bring the book up to date. It is in no sense a revision. The material of the last edition remains absolutely unchanged,—not a paragraph is taken away—only the additions which have been made to the law of contributory negligence since the second edition of 1892 are fitted into place in the scheme of the book. When we consider the number of decisions in the last few years which have dealt with the subject the amount added to the text seems surprisingly small—some half-dozens of paragraphs only. These added sections deal with new topics constantly before the courts,—a landowner's liability to trespassing children, the rules in regard to the use of electricity as a motor, the doctrines of imputed negligence, etc., and in themselves are adequate, but it is absurd to say they represent the growth of the law on contributory negligence for the last six years. That portion of the work of the new addition seems half-hearted.

The collection and arrangement of recent authorities in the form of foot-notes, is, to the editor's mind, of greater importance, and there the work is, apparently, well done. A handful of representative recent cases, such as *O'Toole v. Pittsburgh & L. E. R. Co.*, 27 Atl. Rep. 737 (Penn.), *Wolf v. Lake Erie & W. R. R. Co.*, 45 N. E. Rep. 737 (Ohio), *Southern Ry. Co. v. Pugh*, 37 S. W. Rep. 555 (Tenn.), and *Jobert v. Troy City Ry. Co.*, 36 N. Y. Supp. 105, are omitted, but as a rule the work seems careful and complete. And this is the more notable and praiseworthy because of the difficulty of interpreting many of the cases on the subject of negligence, whose decisions as to the weight of evidence are constantly regarded as laying down rules of law.

J. F. C. JR.

BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE. By Charles Fisk Beach, Jr. 3d Edition. Revised by John J. Crawford. New York: Baker Voorhis, & Co. 1899.

GENERAL DIGEST. Quarterly advance sheets. Rochester, N. Y.: Lawyers Coöperative Publishing Co. Jan. 1899.

HISTORY OF THE LAW OF REAL PROPERTY. By Kenelm Edward Digby. 5th Edition. Oxford: Clarendon Press. 1897.

REGISTRATION OF LAND TITLES. By Francis Bacon James. Cincinnati: W. H. Andersen & Co. 1899.

